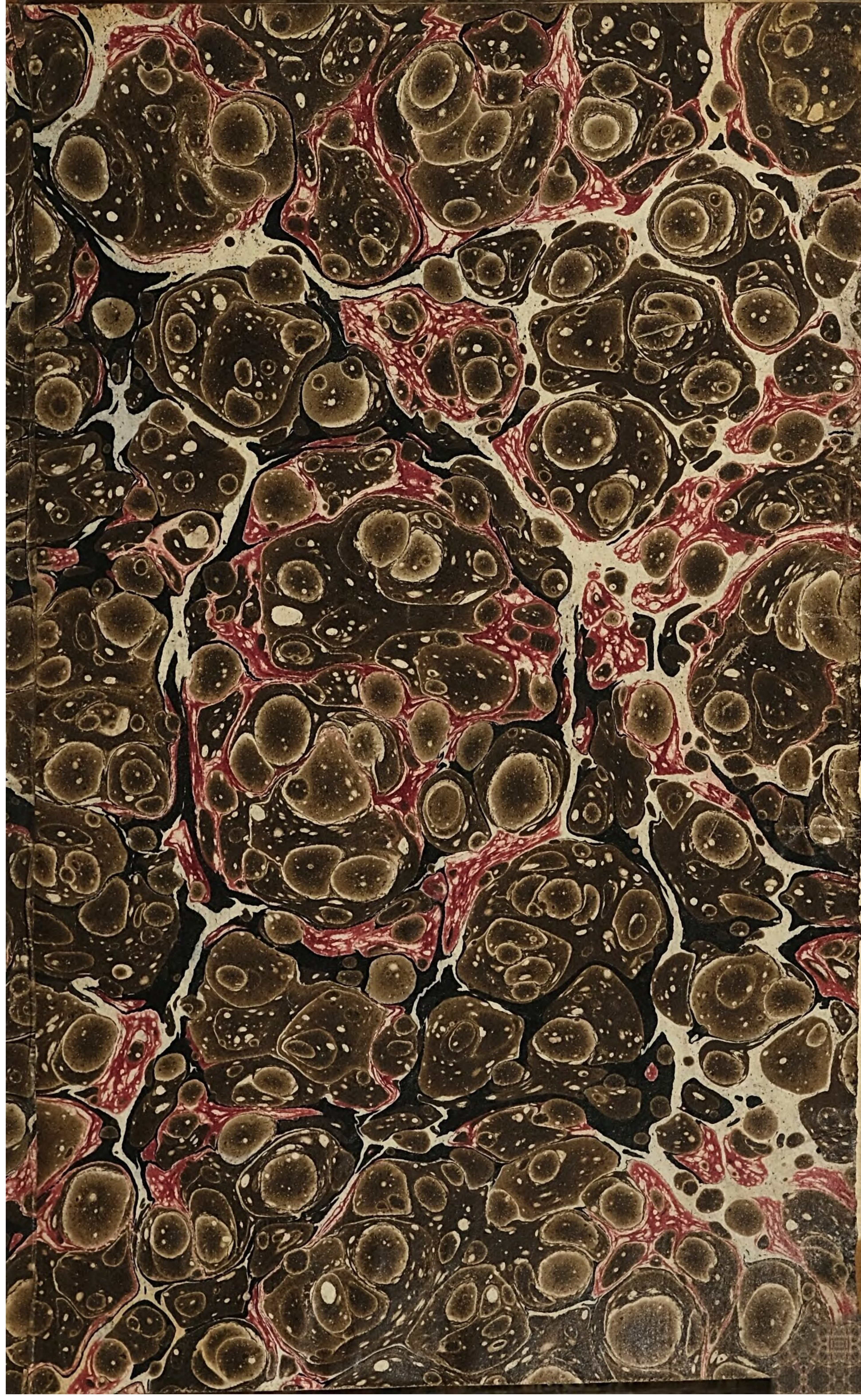






CAPT.^N GORDON,
Royal Navy.



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A
TREATISE
ON
NAVAL COURTS MARTIAL.

TREATISE

TREATISE

NAVAL

ON

NAVAL COURTS MARTIAL

AND PUNISHMENT

BY THE HONORABLE

AND ALSO BY THE HONORABLE

1805

J. M. Gordon - M. S. Book
TREATISE — *Primer*

ON

NAVAL COURTS MARTIAL.

BY

JOHN DELAFONS,

ONE OF THE SENIOR PURSERS IN HIS MAJESTY'S NAVY.

LONDON:

PRINTED BY C. WHITTINGHAM,
Dean Street:

AND PUBLISHED BY P. STEEL, AT THE NAVIGATION
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PORTSMOUTH; E. HOXLAND, PLYMOUTH DOCK; J. BLACK, YARMOUTH; AND
E. JACOBS, SHEERNESS.

1805.

TREATISE

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ONE OF THE SENIOR TUNERS IN HIS MAJESTY'S NAVY.

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FOSTER LANE; E. HOULAND, FLYMOOTH DOCK; J. BUCK, LAMBETH; AND
R. JACOBS, SHREVE.

1802.

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INTRODUCTION.

IF practical acquaintance with a subject is to be pleaded in extenuation of him who undertakes publicly to discuss it, the following pages may with some confidence be submitted to the attention of those for whose information they were primarily designed. Forty-five years, the greater portion of which have been passed in the service of the British Navy, and in situations where the Author was not unfrequently called upon to discharge the arduous duties of a Deputy Judge Advocate, must have been occupied with little credit to himself, and as little benefit to others, if he had not become generally conversant with the nature and objects of those judicial institutions, which regulate our maritime proceedings,

and which so essentially contribute to the security, the independence, and the prosperity of the country.

Not that he imagines himself to have here presented to the world an unexceptionable or immaculate performance, where sagacity shall detect no errors, and where ability can supply no deficiencies. One main view in his labours, has been an ardent wish to furnish those officers who embrace the naval profession at an early stage of human life, perhaps before the judgment is sufficiently matured to investigate the principles of common jurisprudence, with the knowledge requisite to qualify them to act with discrimination as well as justice, in the responsible characters which, as judges and jurors, they may be called upon to sustain, shortly after their arrival to legal years of discretion. Even the activity of a military life, when early entered upon, must in many instances interfere so much with any pursuits not inseparably attached to actual service, as to prevent the timely acquisition, however desirable, of the information which the pre-

sent work seems calculated to convey. Keeping this object constantly in mind, the Author has wholly attended to simplicity and conciseness, in detailing the result of his experience and his enquiries. To be understood, and to be useful, is the praise which he has studied to acquire.

Much has been urged on the severity of martial laws, of which proofs will probably occur in the perusal of this Treatise. Undoubtedly, men who are amenable to military jurisdiction, submit to many privations, perhaps hardships; but these privations and hardships are indispensably necessary to the welfare of the country, in whose defence they are engaged. Whenever discipline shall become relaxed; whenever officers shall no longer be competent to assert the powers with which they are invested, for the maintenance of subordination and diligence; then, and not till then, will the British Navy, which has hitherto enforced respect and awe on surrounding nations, instead of proudly constituting the bulwark and glory of these kingdoms, become baneful at home, and despicable abroad;—the scourge

of their own country, and the derision of their enemies. These laws, however, certainly entitle the subjects of their power to all the consideration and protection that a liberal and opulent people can extend, to make their situation comfortable to themselves, and beneficial to the state. If an empire holding the dominion of the sea, thereby enjoys a kind of universal monarchy, too much cannot be effected for the support and encouragement of those individuals by whose exertions (under God!) such a sovereignty is preserved and exerted.

Not contenting himself with a bare recapitulation of forms, usages, or precedents, the Author has endeavoured, in the course of this Treatise, to develope the principles upon which our Naval Code appears to have been constituted; to trace institutions to their causes, and pursue them in their consequences: anxious that the laws and regulations, which he has laboured to elucidate, should at length be so far comprehended, as to admit of a more certain interpretation, and, of course, operate with greater propriety and effect. He would therefore hope, that this

department of his work will be found to possess no mean claim to the regard even of the experienced and intelligent part of the British Navy; to whom, as a book of reference at least, the volume may be a desirable acquisition.

The grand object of the Legislature, when establishing laws for the regulation and discipline of the naval forces of this realm, was not to impart to any individual, however eminent, an extensive coercive authority, that had not the general welfare for its sole and legitimate basis.

Wheresoever, therefore, the defects in our maritime judicial ordinances seemed to the Author to demand the interposition of legislative wisdom, he has candidly stated the dictates of his own reflection on the subject. It is to this portion of the Treatise that he adverts with peculiar satisfaction. He cannot suppose that this freedom will be censured, as originating in any motives which ought not uniformly to govern the mind in its researches after truth; nor will he imagine, that it can subject him to the dis-

pleasure of the enlightened and impartial part of the officers in the navy. Should, indeed, the observations he has thus offered, eventually induce persons of rank and influence in the service, to second the amendments which he has ventured to suggest; and obtain such a revision of the existing Naval Code, as that no private opinion, from whatsoever quarter it may proceed, shall direct its application;—if these ends are answered, the proudest wish of the Author's heart will be honourably and amply gratified.

London,
February, 1805.

A

TREATISE

ON

NAVAL COURTS MARTIAL.

CHAPTER I.

OF THE NATURE OF NAVAL COURTS MARTIAL.

THE necessity of establishing laws and regulations for the guidance and direction of an armed force, either by land or sea, in all civilized states, has been universally acknowledged. Varying according to the temper and character of the chief in authority, such regulations have, in a greater or lesser degree, been sanguinary and oppressive; ordained as they are, to preserve a large proportion of men, rendered by nature and circumstances turbulent, in awe and restraint, to act as one great body, for the good of the country in whose service they are employed. The effect of these laws

extended only to those citizens, or others, who attended military expeditions; being in general also temporary, and ceasing to have any force on the attainment of the object for which they were immediately established. It is little more than a century since they experienced the legislative sanction of this kingdom. In the 22nd year of the reign of George II. the several laws and statutes relative to the regulation of his Majesty's naval forces were collected and digested into one act of parliament, the operation thereof commencing on the 25th of December, 1749; part of which act, commonly known by the name of The Articles of War, is directed to be publicly read on board every one of his Majesty's ships and vessels of war in commission, once a month at least; but the part thus inculcated on the ship's company is restricted to articles No. 1 to No. 36, as that which is deemed most necessary to be impressed on their minds. Some very material alterations and amendments were made in this code, by an act passed in the 19th of George III. which, repealing *the 12th and 13th articles*, inserted the same clauses with an addition, by which courts martial were empowered "to mitigate the sentence of death to such

other punishment as the nature and degree of the offence was found to deserve:" *these* were the articles as they originally stood, which bore so hard against Admiral Byng in 1757; and of which his judges complained, as subjecting them to the melancholy necessity of pronouncing on him sentence of death.

The act of the 19th year of our present Sovereign likewise repeals and makes void, to all intents and purposes, that part of a former act, which prevented members of courts martial from quitting the ship in which a trial was begun, or to go on shore until sentence was pronounced, (unless in cases of illness, to be judged of by the court,) upon pain of being cashiered*; and states the inconvenience and prejudice it occasioned to the health of the officers summoned to attend as members of courts martial. Therefore the members may now quit the ship, go on shore on public duty, or private business, and mix in society, from the time the court adjourns, until they re-assemble; but the necessity of their meeting every day to form a court (Sundays excepted) remains still in force, and can by no means be dis-

* Act 22 Geo. II. sec. 15.

pensed with, so long as a sufficient number of members can attend, to constitute a legal court martial. In addition to sickness being admitted as a reason for members absenting themselves, it extends also to cases of an extraordinary and indispensable nature, to be judged of by the court.

MEMORANDUM.

On Tuesday the 9th day of Feb. 1796, a court martial was assembled on board his Majesty's ship Prince George, in Portsmouth Harbour, composed of the following members :

PRESIDENT,

Rear Admiral Sir Roger Curtis.

* Rear Admiral Harvey. Rear Admiral Bligh.

CAPTAINS,

Chas. Edmd. Nugent.	* Edmund Dodd.
* Sir Chas. Cotton.	John Thomas.
* J. H. Whitshed,	Sir Richard Bickerton.
Robert Montagu.	Edward Thornborough.
Sir James Saumarez.	* James Vashon.

Moses Greetham, Esq. Deputy Judge Advocate.

and proceeded to the trial of Captain James Norman †, late of his Majesty's ship Medusa,

† Captain Norman was on half-pay when he was tried. It is rather prejudicial to an officer to be tried whilst on half-pay ; as the court have it not then in their power to

for his alledged inattention in convoying to England the Jamaica fleet. A statement of facts was transmitted from the Admiralty to the president, on which the trial was grounded, and John Sewell, Esq. of London, agent for the planters and merchants resident in Jamaica, appeared in court, and carried on the prosecution in their behalf: he was attended by Mr. Shaw, counsel for the underwriters.

Without entering into the particulars of this trial, I shall only attend to an extraordinary circumstance, which occurred on Thursday the 25th February, being the 15th day of the trial, and the third day after Captain Norman had entered upon his defence. Admiral Harvey*, and four of the captains*, members of the court, had orders from the Admiralty to proceed immediately to sea, on the utmost emergency, as the Dutch fleet had got out of the Texel. This being communicated to the court, they

mitigate or soften his sentence, by dismissing him from the command of his ship, as in the case of Captain Molloy; but must either divest him of time in his rank, or cashier him from the service intirely, which deprives him of his half-pay, or pass the sentence, as in this instance:—unless where the offence renders capital punishment indispensable.

deemed it, in the words of the act, an extraordinary and indispensable occasion; and in virtue of the powers lodged in them by the act of parliament of the 19th George III. which repeals part of the 15th section of the act of the 22nd George II. respecting members not going on shore until sentence is pronounced, and extends the cause of absence, (which was before confined to cases of sickness only) *to other extraordinary and indispensable occasions*, subject to the judgment *of the court*,—they permitted the five members to withdraw, and absent themselves from the trial. The remaining eight members continued their sitting until judgment was pronounced, on Monday, the 29th February, to the following effect:

“ That the charges have been in part proved against the said Captain James Norman; but, in consideration of want of obedience to signals, and other circumstances attending the voyage, the court doth adjudge him only to be reprimanded, and to be continued on half-pay for the remainder of his life; and the said Capt. James Norman is hereby reprimanded, and ordered to be continued on half-pay for the remainder of his life accordingly.”

The urgency of the service was such, that

the Admiralty did not wait until information could be received whether the court had deemed the orders the members were under of sufficient force for them to judge it expedient to permit those officers to absent themselves from the court martial; but sent Admiral Colpoys and four captains immediately down to Portsmouth to supersede Admiral Harvey and the four members, in case they should find them sitting at the trial. On their arrival (Friday morning) they found they were gone down with their ships from Spithead to St. Helens; whereupon they returned to London, as the members who had been withdrawn could not, after two days' absence, resume their seats at the court martial.

As the expediency of the cause of absence is to be judged of by the court, and no mention is made of the necessity of its being permitted unless with consent of the parties on the side of the prosecution and defendant, it would appear that the court was not obliged to ask, if there were any objection to the members withdrawing themselves, and submit the decision of the trial to the judgment of the remaining members: yet the question was asked, and both parties consented, which so far was satisfactory. Had,

however, the parties refused and remonstrated, still the court was competent to over-rule the objection.

It is particularly expressed in the 13th section of the 22d George II. that nothing in the act shall empower the Lord High Admiral, or the commissioners for executing the said office, to direct or ascertain the number of persons of which any court martial shall consist; yet in the act of the 19th of George III. which repeals and alters part of the 15th section of the before-mentioned act, it in some measure encroaches on the spirit of the 13th section: for although it is not probable that the lords commissioners of the Admiralty would be influenced to give orders for any member or members to proceed to sea but in cases of public emergency, yet it is possible that a power of such magnitude might, in trials of particular political cases, be warped to serve such ends, in order to remove members who might be looked upon with a jealous eye, as leaning to or favouring the cause of the officer on his trial.

Before the 19th of George III. there was no power for the court to grant leave for members to absent themselves but in cases of sickness: if the service then required the ship commanded by any member to be

sent to sea, an officer was ordered on board to act in his stead, as was the case even on this trial; for, in the early part of it, when the court was full, acting captains were appointed to take the command of the *Robuste* and *Ramillies*, in the room of Captain Thornborough and Sir Richard Bickerton, and the ships proceeded to sea.

The intention of the legislature, in confining the members on board ship until sentence was pronounced, appears to have been in some respect similar to that which directed the formation of juries, who are not to separate until a verdict is given (although it is requisite for juries to be *unanimous* in their opinion; whereas in courts martial the *majority* decide) in order to prevent them from being tampered with, or their judgment biassed, by discoursing or communicating with persons without doors: but the length of time a court martial may be obliged to sit, perhaps three or four weeks, or even more, rendered the repeal of this restriction indispensable.

These amendments, although passed in 1779, were subsequent to Admiral Keppel's trial; whose court martial assembled on the 7th January in that year, on board his Majesty's ship *Britannia*, in Portsmouth Har-

bour; and from thence adjourned to the governor's house at Portsmouth: being the first naval court martial held on shore, since the laws and statutes relative to the regulation of the navy were reduced into one act of parliament. This adjournment was authorized by an act framed partly to accommodate Admiral Keppel, who complained of his ill state of health, and also to afford more room for the reception of the great number of witnesses called upon this remarkable trial, as well as of a crowded audience, composed of several persons of the most exalted rank and stations in the kingdom.—As, however, the principal amendment in the act just mentioned had not passed, the members of the court martial could not be permitted to separate, and did not stir out of the governor's house or garden until sentence was pronounced; in the same manner as if the court had continued to have been held on board the *Britannia*, where it first assembled. The members of this court martial signed a letter, addressed to the Secretary of the Admiralty, representing the hardship of their long confinement, (which, from the day they first assembled to that on which they pronounced the sentence, extended to *thirty-six days*!) and intreating the Lords Com-

missioners of the Admiralty to take such measures as might remove in future the irksomeness and inconvenience they had suffered. It was in consequence of this remonstrance, that the clause complained of in the act was by the legislature amended.

The distinctions between naval and military courts martial are numerous and considerable. All courts martial in the navy are general ones ; as there is no proceeding in the sea service, which resembles a regimental court martial, appointed to try slight offences and misdemeanors, and without which a soldier on shore cannot be punished : in respect to such offences on board his Majesty's ships, a discretionary power, agreeable to the rules of the navy, is vested in the captain *alone*, or, if absent on service or public leave, in the first lieutenant.

In the army, sentence is not publicly made known before the court is dissolved ; and, when on an officer, is referred to his Majesty, or to some persons duly authorized by him ; without which sanction the judgment is not carried into effect : the members are sworn not to divulge the sentence of the court until it shall be approved of by proper authority ; though the judge advocate does not take this part of the oath, he being only

sworn, not to discover the vote or opinion of any particular member of the court martial. Nor is the number of members requisite to constitute a court martial, the same as in the navy; general courts martial in the land service, in no part of the world, can consist of less than thirteen members (except in Africa, or New South Wales, where it may consist of so small a number as *five*); but the act does not specify how far the number can be increased in any part of the world.

In naval courts martial the members, like juries in courts of law, give their opinion *instanter*, which is absolute and conclusive; and the judge advocate, by their direction, draws up the sentence, which, when signed by the members, is read in open court, in presence of the prisoner; after which the court is dissolved. But if the sentence be death, it cannot, (except in cases of mutiny) be carried into execution until the Lords Commissioners of the Admiralty (if the crime is committed within their limits,) or (if on a foreign station) the commander in chief, grants a warrant to that effect. Other bodily punishments are referred, as to time and place, to the discretion of the commander in chief. In respect to officers being

sentenced to be cashiered, or suspended, it immediately takes place on sentence being pronounced, and transmitted to the Secretary of the Admiralty, or the commander in chief; who cannot alter the sentence by either adding or diminishing; but only use the power with which they are invested, of suspending a sentence, or remitting part of punishment: they cannot grant a pardon on sentence of death; that great and high prerogative being lodged exclusively in the breast of Majesty, the constitutional fountain of mercy. Reasons have been alledged, for the distinction evinced by approving sentences in army courts martials before divulged or made public. His Majesty, it is urged, retains the entire controul and direction of the army; there existing no person appointed to hold and execute the office of captain-general of his forces in Great Britain or Ireland; whereas he has delegated his authority, in respect to the navy, to the Lord High Admiral, or the commissioners for executing the said office: That the mutiny bill, for the discipline of the army, is annual, and, if not renewed before its expiration, that a temporary suspension of its powers would prevent the holding courts martial for punishment of

offences committed in the land service; while the act of parliament for regulating his Majesty's forces by sea, is a permanent bill, which must continue in force until repealed, altered, or amended by the same authority by which it was enacted.

Martial law being no longer enforced at the discretion of the crown, or unbounded in its authority either as to persons or crimes, its courts are at present held by the same authority as other courts of judicature in this kingdom. The King, or (by his delegated power) the Lord High Admiral, or the commissioners appointed to execute the authority of the same, have the prerogative of controuling the rigour of the law, by pardoning or remitting punishments not capital; but his Majesty, or his delegates, can no more increase, diminish, or alter the sentence of a court martial, than a judgment given in any of the courts of common law. Being himself the fountain of national honour, the King has undoubtedly and indisputably a right to dismiss any naval officer of what rank soever from his service *without trial*, though such exertions of the sovereign power I do not recollect to have ever met with in the course of our naval history for a century past at least;

except an intentional one by his late majesty George II. in the year 1758, in the case of Admiral Sir Peter Dennis. Sir Peter was then commander of his Majesty's ship Dorsetshire, at anchor off Belem Castle near Lisbon, in the river Tagus, at the time an attempt was made to assassinate the king of Portugal: he would not permit the Portuguese officers to search the ship to seek for any of the assassins, who, they suspected, might have sought shelter, or been concealed on board the Dorsetshire; but assured them that no such persons were on board, that he would not in any shape have granted them shelter or protection, again pledging his word of honour, in the most solemn manner, that no persons of the description they were in search of were on board. Not satisfied with this explanation, the officers returned, and insisted upon searching the King's ship, in the same manner as they had done all the other ships in the river. The captain now replied, he should be unworthy of the commission he had the honour to bear in his Britannic Majesty's service, could he be capable of falsifying his word, in respect to the persons they suspected might be concealed on board; that it was not in his power (if they yet remained

unsatisfied with his declaration) to permit so flagrant a disgrace to be offered to the British flag, as submitting to allow the ship he had the honour to command, to be searched; and that, should they exert force, he would certainly repel it: on which they left the ship. The Portuguese ministry thought proper not to proceed to extremities, and the Dorsetshire quitted Lisbon without any further interruption; but the king of Portugal wrote a letter with his own hand to George II. complaining of the conduct of Captain Dennis. So exasperated was his Majesty at the supposed impropriety of Dennis's conduct, that he sent for Lord Anson, then first lord of the Admiralty, and ordered the name of Captain Dennis to be erased from the list of post captains. On his lordship's humbly remonstrating, what an ill effect his Majesty's intentions might produce on the navy in general, when it was publicly known that an officer had, for doing his duty, fallen under the heavy displeasure of his Majesty, who had dismissed him from his service,—when he, Lord Anson, as first lord of the Admiralty, would have deemed it his duty to have ordered Captain Dennis to have been tried by a court martial, had he permitted the ship to be searched;

the King, convinced by his lordship's arguments, immediately relinquished his intentions.

How far the power delegated by his Majesty to the lord high-admiral, or to commissioners for executing that trust, may extend in respect to dismissing officers from the naval service without trial, I do not presume to determine;—this far I can assert, that I have not known or read of any instance, in which it has been exercised with respect to commission officers: most probably from fear of giving umbrage and disgust to so large and respectable a body as the officers, who derive military rank by the establishment of the naval regulations. Nevertheless I may venture to affirm, that warrant officers, who hold a civil employment on board ship, and who are, by the establishment of the navy, of that class whose employment is permanent, whether the ship is in commission or otherwise, from not being entitled to the half-pay, have, whilst they belonged to a *ship in commission*, been, by order of the Admiralty, superseded in their office, and dismissed from the service without trial by a court martial, on a supposed or implied censure; abandoned to great distress after years of servitude in a line in which they were brought

up from an early time of life, and compelled to seek for a new profession. I shall here state one particular instance:

Mr. Charles Ross, purser of the *Iris*, was dismissed the service without a court martial, for a supposed connivance at the irregularities of his captain, when purser of the *Heart of Oak* hired armed-ship. To illustrate this case, I shall submit the following certificate, which was granted to him many years after, in hopes to get him re-instated in the service, when there was an appearance of a war breaking out.

C O P Y

OF AN

ORIGINAL CERTIFICATE,

Delivered at the Admiralty Board the beginning of December 1788, with a Memorial from Mr. CHARLES Ross.

“ WE whose names are hereunto subscribed, members of a court martial assembled in October, 1779, for the trial of Captain Nathaniel Crosby, commander of his Majesty's hired armed-ship the *Heart of Oak*, upon several charges exhibited against him by the master of the said ship, were of opinion

that the following parts of the charge were proved; *viz.* that Captain Crosby did discharge, without proper authority, good and eligible men, when orders were issued for impressing; that two boys were rated as men on the ship's books of the Heart of Oak, and put out of the way when the ship was paid; and falsely mustering and victualling upon the ship's books a man from the month of February, 1778, till the 22d June following, and then discharging him dead; and for which he was adjudged to be cashiered, and rendered incapable of farther employment in his Majesty's naval service.

“ That from the manner Mr. Charles Ross, late purser of the said ship (but at the time of the trial purser of the Iris) delivered his evidence against the captain, it induced us to believe, *at that time*, he might have benefited by the victualling the said man, and was materially concerned in managing the ship's books, and for which transaction that officer was dismissed from the service; the Admiralty therefore thought fit to supersede Mr. Ross, as appears by letter to Lord Shulham, dated the 28th day of October, 1779: we *now* find, that Mr. Ross, conscious of his own innocence, earnestly begged a court martial, after the dismissal of Captain Crosby, and we do also find certificates from

the navy and victualling boards, which prove the delivery of his victualling book into office some months prior to the court martial, and that he had no benefit in victualling the said man; with affidavits from the lieutenant and master of the Heart of Oak, of Captain Crosby and his clerk messing together, and keeping the ship's books in their possession.

“ We also find he has possessed in his favour a general good character, and produced testimonials from several respectable commanders; that he has suffered much both in mind and circumstances; has a large family: and therefore, from all these circumstances, *and not having been tried at a court martial*, we most earnestly recommend him to the Right Honourable the Lords Commissioners of the Admiralty, that their Lordships would be pleased to take his case into consideration, in order to re-instate him, or to employ him in any other manner they may think proper.”

Signed,

George Darby, President.

Robert Digby.

Jos^h Peyton.

Jn^o L. Ross.

Jn^o Stanton.

Chal^r Ogle.

Jn^o Carter Allen.

Edm^d Affleck.

George Balfour.

To the Right Honourable the Lords
Commissioners of the Admiralty.

Notwithstanding the respectability of the members who signed this certificate, he remained at the time this treatise was wrote, (1792) unprovided for in the naval service. Every reflecting and impartial reader can form but one conclusion on this subject: as laws and regulations are intended to operate alike, without respect to rank, the delegated power, as well as his Majesty, have a right to dismiss officers from the service without a trial.

Power, however, cannot bias or influence a court martial, in matters committed entirely to their decision; whilst officers, sworn in the most solemn manner to be guided by their conscience and the custom of the navy, continue to cherish that strict and delicate sense of the high and important trust reposed in them, as officers in their judicial capacity, with which men of military character are early and deeply impressed.

Whatever difference of opinion may prevail concerning the power of the Admiralty as to the *dismission* of officers from the service without a trial by court martial, I shall here instance a proof, that after sentence is passed on an officer, it has been deemed not to be legal for their lordships to exercise *that* power, on a presumption that the sentence of the court was not so severe

and extensive as the articles of war, under which he fell, directs the punishment to be.

Captain Isaac Coffin, who commanded the *Thisbe* on the Halifax station, was brought to a court martial in 1789, on a charge exhibited against him by the master, for false musters; and the charge being proved, he was sentenced *only* to be deprived of the command of his Majesty's ship *Thisbe*, as it appeared to the court that he received no advantage or emolument from this breach of his duty. Shortly after his return to England, a minute was made at the Admiralty, Earl Howe being then first lord; "That the board had come to the resolution of putting off the list of post captains the said Isaac Coffin, whereby he was dismissed his Majesty's service, and rendered incapable of being ever after employed in the navy, agreeably to the 31st article of war, under which he fell; which condemns an officer convicted of the offence with which he was charged, to be cashiered, and rendered incapable of further employment in his Majesty's naval service, *without any mitigation whatsoever.*" The Admiralty by this conduct supplying the deficiency and impropriety of the sentence pronounced against him, and exercising a power to enforce it. Captain

Coffin complained, by petition, to his Majesty, and the Privy Council directed the judges to report to that board on the merits of the petition ; and their report was made as follows:—

To the King's Most Excellent Majesty,

In obedience to the above order of your Majesty in Council, we have taken into our consideration the charge exhibited against Isaac Coffin, Esq. the sentence of the court martial, and also the resolution of the late board of Admiralty ; and we are of opinion, that the said sentence is not legal ; and that the punishment directed to be inflicted by an act of the 22d of the reign of his late majesty King George II. chapter 33, upon persons convicted of the offence specified in the 31st article of war, established by that act, cannot be inflicted, or judgment thereon be *pronounced or supplied* by any other authority than that of the court martial which tried the offender.

Signed,

Kenyon.

Loughborough.

Ja^s Eyre.

Fra^s Buller.

H. Gould.

H. Ashurst.

B. Hotham.

J. Wilson.

N. Grose.

A. Thompson.

23d January, 1790.

This opinion states the sentence to have been illegal; but the reason not being assigned, it becomes proper to observe that the members of the court martial, after having inserted in the sentence that the charge was substantiated, had assumed to themselves a power not warranted by the naval articles of war, which admitted no latitude or mitigation if the offence was proved.

The opinion of the judges of the land conveys this interesting and important lesson—that no executive power has a legal right, by the constitutional laws of this country, to inflict a severer punishment than the members of a court martial, (however defective their sentence,) have pronounced: the error of the court turned, on this occasion, to the advantage of the prisoner. Had it proved otherwise, had the measure of the punishment been more, instead *of less*, than the law dictated, and the person who complained come into a court of justice standing on the ground of so legal a decision, bringing his action against the members of the court for exceeding the authority given them by the naval laws; it is well worthy the reflection of officers, what the consequence might have been, and therefore to be extremely careful to keep within the strict

letter of the law, and not permit their determination to be influenced by circumstances. The trial of Admiral Byng, and the consequences ensuing, will convince young officers how strictly the letter of the law was then adhered to.

As my intention is not to confine myself merely to a treatise, but to extend my observations in a kind of dissertation, I hope it will not appear foreign to the investigation, if having produced a sentence which has been declared illegal, where the punishment was *less* than the law had expressed, I now state a particular case, in which complaint was made of the *rigour* of a sentence; especially as it proves that members of a court martial are subject to actions at common law, when they inflict a punishment exceeding the limits of constitutional power.

In the year 1743, Lieutenant Frye, of the marines, was tried by a court martial on board the Oxford, in Port Royal harbour, in the island of Jamaica, for disobedience to the orders of his captain; refusing to assist the lieutenant of the ship to take an officer prisoner, who belonged to another ship, for his unruly behaviour whilst on a visit on board the Oxford, and convey him on board the ship to which he belonged: the two

lieutenants wanted the captain to give them an order in writing for so doing. For this offence Frye was sentenced by the court to *fifteen years* imprisonment, besides being declared incapable of ever serving in his Majesty's service; in consequence of which he was brought a prisoner to England, and confined in the Marshalsea. Shortly after his arrival, he stated his case before his Majesty's Privy Council, which appeared in so justifiable a light, that he was released from imprisonment, and by his Majesty's order restored to his rank. He afterwards brought an action against Sir Chaloner Ogle, who sat as president on his court martial, and had a verdict given him of *one thousand pounds* damages: it was proved he had been kept fourteen months in the most severe confinement, before he was brought to his trial. The judge likewise informed him, that he was at liberty to bring his action against any of the members of his court martial. The result of this affair is still more remarkable.

Upon application made by Lieutenant Frye, Sir John Willes, then lord chief-justice of the Common Pleas, issued his writ against Admiral Mayne and Captain Rentone, two of the officers who sat as members in the

above court martial, who happened to be at that time in England, and were members of a court martial then sitting at Deptford, of which Admiral Mayne was president; they were arrested immediately after the breaking up of the court. The other members highly resenting what they conceived to be an insult, twice met on the subject, and came to certain resolutions, which the judge advocate was directed to transmit to the board of Admiralty, in order to their being laid before his Majesty. In these resolutions they demanded “ satisfaction for the high
 “ insult on their president, from all persons,
 “ how high soever in office, who had set on
 “ foot this arrest, or in any degree advised
 “ or promoted it: moreover complaining,
 “ that by the said arrest the order, discipline, and government of his Majesty’s
 “ armies by sea was dissolved, and the statute of the 13 Charles II. made null and
 “ void.”

This altercation continued some months; at length the court martial judged it necessary to submit; and they sent a letter to Lord Chief Justice Willes, signed by 17 officers, admirals and captains, who composed it, in which they acknowledged, that “ the resolutions of the 16th and 21st May were unjust and unwarrantable, and do ask pardon

“ of his lordship, and the whole court of
 “ Common Pleas, for the indignity offered
 “ to him and the court.” This letter Judge
 Willes read in open court, and directed it to
 be registered in the remembrance office,
 “ as a memorial to the present and future
 “ ages, that whoever set themselves above
 “ the laws will in the end find themselves
 “ mistaken.” The letter from the court
 martial, together with Judge Willes’s accep-
 tation, were inserted in the next Gazette, the
 15th of November, 1746*.

It may be objected, that this event took
 place previous to passing the act now in
 force for the regulation of the navy; but
 there is no clause in that act, which screens
 or shelters the members of a court martial,
 more than in the act of the 13th Charles II.

But although judgments of courts mar-
 tial are, like those of other courts, liable to
 be taken cognizance of, and the members
 punished for illegal proceedings; yet, in
 order to protect and support the members of
 a court martial in the due and legal exercise
 of their judicial functions, they not only do
 not become liable to be punished for mistakes
 into which an honest and well-meaning man
 may innocently fall, but to discourage liti-

* De Lolme on the British Constitution, p. 465.

gious persecutions, if the plaintiff or prosecutor, in any action brought against members of courts martial, becomes non-suited by the verdict of a jury in favour of the defendant, he, or they, shall recover *treble cost* which shall have been sustained, by reason of the wrongful vexation experienced in defence of the said trial or suit.

There is also another tribunal before which the proceedings of a court martial are subject to censure *at least*; I mean the House of Commons, where, in 1744, it was resolved (notwithstanding the opposition of Mr. Pelham, who was then first lord of the treasury and chancellor of the exchequer, and far from an unpopular minister) “ That the
 “ proceedings of a naval court martial,
 “ held for enquiry into the conduct of Cap-
 “ tain Norris, &c. &c. were *partial, arbi-*
 “ *trary, and illegal* *.”

After acquittal, no person can again be tried for the same offence; and there have been instances when the sentence was thought too severe, in which the commander-in-chief has restored or re-appointed the officer that has been broke, without the interference of the Admiralty: this, as it can seldom happen, and the instance I shall adduce is

* Debates of the House of Commons, 18 Geo. II.

the only one that occurs to my recollection, becomes particularly worthy of observation. Minutes of the proceedings of a court martial are delivered by the judge advocate to the commander-in-chief, in order that he may, if he thinks proper, peruse them, before he orders the sentence to be carried into execution ; which implies that he has a discretionary power, should there appear sufficient cause, from particular circumstances, or evidence in favour of the prisoner, that could not be obtained at the time of trial, to order the proceedings to begin *de novo*, or a second trial, without which it would be a severe censure on the members of the court martial.

The re-appointment of an officer, who had been broke as a lieutenant in his Majesty's naval service by the sentence of a court martial, happened in North America, in the case of Lieutenant John Brown, who commanded the Tryal schooner at Rhode Island in 1777, where he had no other means of preventing her from falling into the hands of the Americans (then in rebellion) but by setting her on fire ; which he did, and made his escape to the English ships of war, on the other side the neck of land, who could afford him no assistance. He was accordingly brought to a court martial for the loss

of the schooner, by Sir Peter Parker, who had a detached squadron under his command. The Honourable Captain Charles Fielding was president, and Lieutenant Brown was sentenced to be dismissed the service. On his return to New York, and representing his situation to Lord Howe, then commander-in-chief in North America, stating the circumstance under which he lay, that obliged him to act in the manner he had done, and complaining of the excessive rigour of his sentence; that nobleman was induced to have all the necessary enquiries made into the case, which, on investigation, appeared to his lordship not to render Lieutenant Brown so culpable as the court martial had judged him to be, and he was ordered to remain on board the *Eagle*. In about two months after his dismissal Lord Howe set aside his sentence, and reinstated him in the service, by appointing him lieutenant of the *Cornwallis* galley, without waiting for any directions from the Admiralty.

Notwithstanding the permanency of the laws which are in force for the guidance and regulation of courts martial, these cannot be assembled without a special commission or warrant for that purpose. All naval courts

martial, in any port of Great Britain or Ireland, are held by an order from the lords commissioners for executing the office of lord high-admiral, &c. and are addressed to the officer first, second, or third in command, whoever they may think proper to appoint to preside at the court; unless in fleets employed in channel service, or those who are sent abroad on foreign stations, in which case the commander-in-chief has a particular commission granted him from the Admiralty, without which authority he cannot call and assemble courts martial. For in virtue of his commission as commander-in-chief *only*, either abroad or at home, he is not empowered to order a court to be assembled; at which, by the seventh section of the act 22nd George II. he cannot preside, when abroad, so long as the fleet or squadron consists of more than five ships, but must direct the second in command to hold such court; or in case of illness, or other sufficient reason, which prevents such officer's attendance, then the third in command is to be ordered to assemble the court. •

By the sixth section of the said act it is enacted, that if the officer commanding in chief, who shall be authorized by the lord high-admiral (or the commissioners for ex-

ecuting the said office for the time being) to call and assemble courts martial in foreign parts, “ shall happen to die, be recalled, or removed from his command, then the officer upon whom the command of the said fleet or squadron shall devolve, and so from time to time the officer who shall have the command of the said fleet or squadron, shall have the same power to call and assemble courts martial, as the first commander-in-chief of the said fleet or squadron was invested with.”

The commander-in-chief on a foreign station has, by the sixth section of the said act, in virtue of his commission *to hold courts martial*—an authority which empowers and requires him to grant, by writing under his hand, a commission to the officer of any squadron he may detach from under his command, to enable him to call and assemble courts martial during the time he may be so separated from his commander-in-chief, *but at which he cannot preside* so long as more than five ships compose his squadron, and not when there are only five ships in port; and in case of death, &c. &c. the command devolves on the officer next in seniority, and the authority to assemble courts martial is likewise transferred to him, in virtue of the

commission held by the officer he succeeds. As part of the sixth section alludes to officers who die when holding the authority to assemble courts martial in foreign parts, it becomes a question (on which the act of the 22nd George II. is silent) if the commander in chief of a fleet or squadron, confined in their operations within the narrow seas or limits of the admiralty (which is from the Naze of Norway to Cape Finisterre) he being duly authorized to hold courts martial during the time of his command, should happen to die, &c. &c.; then, whether his successor, by whatever means the command devolves to him, has authority, in virtue of the commission given to the deceased officer, to call and assemble courts martial so long as he continues in the command of that fleet, until his return into any port of Great Britain or Ireland?

By foreign parts, in which the commission is given to empower officers to hold courts martial, is understood our own colonies and plantations, or fleets employed abroad on particular service, without which authority such courts cannot be held. But, by the seventh section of 22nd George II. "if any five or more of his Majesty's ships or vessels of war shall happen to meet in foreign

parts, then, and in such case, it shall be lawful for the senior officer of the said ships or vessels of war to hold courts martial, and preside thereat from time to time as there shall be occasion, during so long time as the said ships or vessels of war, or any five or more of them, shall continue together." Foreign parts, as mentioned in this section, comprize, ports of foreign princes or states, and the ships meeting casually or by accident, independent of each other, and not belonging to, or making a detached part of any particular fleet or squadron; in such case a court martial can be held without a particular commission for that purpose, in order that any flagrant breach of due discipline and regularity may be immediately punished, which might otherwise cast a reflection on, and lower the consequence of the British navy in the eyes of foreign powers.

CHAPTER II.

OF PARTICULAR PLACES TO WHICH THE JURISDICTION OF NAVAL COURTS MARTIAL EXTENDS, IN REGARD TO OFFENCES COGNIZABLE BY THEM; AND OF SUCH, WHEN COMMITTED OUT OF THOSE LOCAL PLACES OR DISTRICTS.

BY the 22nd George II. chap. 33, sect. 4, it is enacted—"That nothing in this act shall extend, or be construed to extend, to empower any court martial to be constituted by virtue of this act to proceed to the punishment or trial of any of the offences specified in the several articles contained in this act, or of any offence whatsoever (other than the offences specified in the *fifth*, *thirty-fourth*, and *thirty-fifth* of the foregoing articles and orders) which shall not be committed upon the main sea, or in great rivers only, beneath the bridges of the said rivers nigh to the sea, or in any haven, river, or creek within the jurisdiction of the Admiralty, and which shall not be committed

by such persons as at the time of the offence committed *shall be in actual service and full pay* in the fleet or ships of war of his Majesty, his heirs, or successors, such persons only excepted, and for such offences only, as are described in the fifth of the foregoing articles and orders.”

The High Court of Admiralty not having jurisdiction of crimes committed on the waters within the body or extent of any English county; so neither has a naval court martial, except in crimes perpetrated, as specified in the articles above-mentioned *.

If therefore any murder is committed by any person on board any ship in the fleet (although both parties should be subject to naval discipline) which shall be at anchor, or lying in any port or haven in Great Britain, *that is within the body or extent of any English county*; such offender shall be delivered up, *on requisition*, to the civil magistrate, and be proceeded against in due course of law: this rule likewise extends to our colonies and islands abroad; as will appear by the following letter from the Governor of Jamaica to Admiral Parry, then commanding officer on that station.

* Blackstone's Commentaries, vol. iv. p. 265.

“ SIR, Spanish Town, 7th April, 1769.

“ I HAVE received, by this last packet, a letter from Lord Hillsborough, a paragraph of which I have thought proper to transcribe to you.—‘ Mr. Elletson having, in a letter, dated the 27th of January, acquainted me with the case of a seaman tried by a court martial for a murder committed on board one of his Majesty’s ships in Kingston Harbour, the jurisdiction in which case he submits to belong to the civil courts in the island (that harbour lying within the body of the county of Surry); I received his Majesty’s directions to lay this letter before the Board of Trade, and the matter having undergone the examination of the proper law department, and it appearing to be the sense and opinion of the King’s law servants, as well upon this case, as upon a former one, under similar circumstances, which occurred while Admiral Keppel had the command in those seas, that the jurisdiction clearly belonged to the civil courts in the island; I have accordingly received his Majesty’s commands to signify this determination to the Lords

of the Admiralty, and at the same time to acquaint you with it, in order *that it may be entered upon record, as a rule in any future case of the like kind.*'

I am, SIR,

Your most obedient
humble servant,

W. TRELAWNY."

"To William Parry, Esq.
Rear Admiral and Commander in Chief,
&c. &c."

Instances occur wherein the Admiralty directed persons accused of murder committed in the fleet, to be delivered up to the civil magistrate: and, on the contrary, instances wherein they disapproved of the measure. But, even if the stroke which caused the person's death was given on the main ocean, at a distance of one or two hundred leagues from land, yet if the wounded should linger until the ship arrived in any port, bay, or harbour, within the body or limits of any county in England, and then die on board the ship, the offender ought to be consigned over to the civil power. In the case of Lieutenant Osmond, of the Swallow sloop, who stabbed Richard Tucker,

a seaman belonging to the Vesuvius bomb-vessel, as he was coming alongside the Swallow, at Spithead, on the 29th December, 1782, of which wound he died, two days after, at Haslar hospital ; application being made to the then attorney general, Lord Kenyon, late chief justice of the court of King's Bench, he gave his opinion in the following words :

“ I presume the wound was given in a place not within the limits of any county ; but be that as it may, still this unfortunate man ought to be delivered up to the civil power, in order to be tried at the next gaol delivery for the county in which Richard Tucker died ; for by the second George II. chap. 21, “ When any person shall be feloniously stricken upon the sea, and shall die of the stroke in England, the offender “ may be indicted in the county where the “ death shall happen.” I do not see what a court martial has to do with the business ; it is for the county gaol delivery, or an admiralty sessions.

January 9, 1783.

L. KENYON.”

This opinion was transmitted to the Admiralty ; and their letter from Mr. Stephens,

the secretary, dated 11th January, 1783, ordered Admiral Sir Thomas Pye to direct that Lieutenant Osmond should be delivered up to the civil magistrates, to take his trial at the next gaol delivery for the county *.

I here subjoin two letters from Mr. Secretary Stephens, which evince a difference of opinion, in two cases that might appear to coincide.

No. I.

Admiralty Office, 20th April 1776.

“ SIR,

“ HAVING communicated to my Lords Commissioners of the Admiralty your letter of the 16th instant, inclosing one from Captain Jarvis of the *Foudroyant*, giving an account of an affray, which happened on the 15th instant, between John Black and Daniel Brady, two seamen belonging to that ship;—the latter receiving an unfortunate blow from the former, under which, and for want of proper care, owing to the transaction not being made known to any of the proper officers, he languished till half past

* Admiral Montague's coxswain was tried by a court martial in Portsmouth harbour, for the murder of a seaman on board his Majesty's ship *Queen*.

five the next morning, and then died; and desiring to know, whether the prisoner should be delivered up to the magistrates of the county of Cornwall, or tried at a court martial; I am commanded by their lordships, to signify their directions to you, to cause him to be delivered up to the civil magistrates, to be dealt with according to law, upon proper application being made to you for that purpose.

I am, &c.

“PHILIP STEPHENS.”

“To Vice Admiral Amherst.”

No. II.

Admiralty Office, 21st February, 1783.

“SIR,

“I HAVE communicated to my Lords Commissioners of the Admiralty your letter of yesterday's date, informing them that Richard Davis, acting midshipman of the Eurydice, having stabbed John Leddel Palmer, another midshipman on board the said ship, on Sunday night last, and of which wounds the latter died; that you had, on the coroner's application, ordered the body of the deceased to be carried on shore to Gosport, where an inquest was taken, and a verdict of wilful

murder found against Richard Davis, whom you directed to be delivered up to the civil magistrate, to take his trial for the murder; in return, I am commanded by their lordships to acquaint you, that this being a case cognizable by a court martial, more especially as the wounds were given and the deceased died *on board* the ship, you ought not to have subjected the body to the coroner's inquest, or to have delivered up Davis to the civil magistrate.

I am, &c.

“ PHILIP STEPHENS.”

“ Admiral Sir Thomas Pye.”

Though this letter, written subsequently to the Attorney General's opinion, appears to have a contradictory tendency, it only proves how anxious the Admiralty are, that all murders committed in the fleets should, if possible, be tried by a naval jurisdiction; in order to impress a greater awe and dread on the crews of his Majesty's ships*.

Depredations on private property, by any person in the fleet (within the limits already described) are cognizable by a civil court, and are therefore not brought before a military tribunal. On board a ship such of-

* See p. 41, note,

fences frequently are punished at the discretion of the captain, when of no extraordinary magnitude or value; but if committed repeatedly, by an old and incorrigible offender, then, in order to stamp the punishment with a greater degree of infamy and ignominy, and to deter others from so flagrant a breach of the laws of society, and of confidence in each other, the offence is punished by running the gantelope—which is inflicted by the ship's company being ranged in two lines on each side the deck, each man furnished with a nettle, when, after the culprit is set off by the boatswain's mate, with the usual cat of nine tails, he is compelled to parade round the deck, for he cannot run (the ship's corporal or master at arms walking before with a drawn sword pointed towards him); and each man, as the offender passes, vigorously applies his nettle on his bare back,—a ceremony which is sometimes thrice repeated.

CHAPTER III.

OF COURTS OF INQUIRY.

IT is remarkable, that no part of the statutes of the 22nd George II. for reducing the laws and regulations relative to the sea-service into one act of parliament, either establishes an authority to direct the assembling of courts of inquiry, or describes them, on the ground of custom or usage, as a necessary part of naval discipline or jurisdiction; neither is their authority defined after they are appointed to be held: nor is the regular mode of procedure to be observed therein, specified in any code of naval regulations.

Such courts are, nevertheless, frequently held, either by directions from the Lords Commissioners of the Admiralty, or by the orders of the commander-in-chief of any fleet or squadron employed on particular services, on foreign or home stations; addressed, generally, to the officer second in command, who is empowered to take to his assistance such a number of flag, or other

officers of the degree of post-captains, (or, if not a sufficient number, master and commanders,) as to him shall appear requisite. Thus circumstanced, I must advert to the method usually practised in conducting courts of this description in the navy; and, with humility and diffidence, submit the opinion which is generally held of their use, to the judgment and correction of those of long established experience in their jurisdiction and discipline.

The officers constituting a court of inquiry are not confined as to number; neither are they, nor the witnesses to be examined, sworn: for as the powers of courts of inquiry are entirely arbitrary, not being founded on any statute, law, or even invariable custom, no person can *legally* be obliged to give his testimony, or plead before a court of inquiry. The persons, therefore, whose conduct is to be inquired into, as well as the witnesses, have many things to plead, and give in evidence before a court martial, from which they are exempted before a court of inquiry. On convening this court, the order by which its members are assembled is read in presence of the person whose conduct is to be investigated; but it is in the discretion of the court to permit

him to be present during the time of examination of witnesses, a privilege to which he is entitled by law at a court martial. The determination or opinion of the court, is not publicly announced before it is dissolved; the *result* of their consultation is reported to the Admiralty, or the commander-in-chief: but no minutes are sent of their proceedings, as at courts martial. The judgment of the court being thus submitted to the Admiralty, or to the commander-in-chief, there may appear sufficient grounds to bring an officer to a court martial, as well as to acquit; who may then expect to be apprised of the decision of the court: but it does not seem that he can claim this as a right. In some cases, indeed, the matter may be so intricate, of so serious and delicate a complexion, that the report may state merely the circumstances and facts which come out on examination; leaving the conclusive inference to be drawn by the Admiralty, or the commander-in-chief, from the statement transmitted for their inspection.

Courts of Inquiry have frequently been granted, on application from officers whose conduct had been aspersed, without any specific charge being exhibited against them, so as to render them amenable to a court mar-

tial; and this, in order that their professional character might be investigated, and cleared, before *such a court of honour*, of what they considered as injurious to their feelings and reputation.

On other occasions, when the treatment received from a superior officer was felt harsh and grievous, though not to that arbitrary and oppressive extent as to warrant bringing him to a court martial for his behaviour, courts of inquiry have been solicited, in order to determine whether such officer was deserving the odium, rebuke, or censure, which he had experienced from his superior in command.

These courts have, likewise, been ordered, without any application to that effect on the part of the individual, to inquire into the conduct of an officer, solely for the satisfaction of the Admiralty, or the commander-in-chief, relative to general or particular detached actions or engagements.

It is to be presumed, that the power of appointing courts of inquiry is originally vested in the crown. In support of this opinion, I insert the copy of a warrant under the King's sign manual, to inquire into the failure of an expedition on the coast of France, under the command of Sir John

Mordaunt. This account of the most remarkable court of inquiry that has been held for a series of years, is transcribed from that excellent Treatise on Army Courts Martial, written by Major Stephen Paine Adye, of the royal regiment of artillery.

“ *GEORGE R.*

“ Whereas we were pleased, in August last, to send a number of our troops on an expedition against France, with orders and instructions to attempt, as far as should be practicable, a descent upon the French coast, at or near Rochfort, in order to attack, if practicable, and by a vigorous impression force, that place; and to burn and destroy, to the utmost of their power, all docks, magazines, arsenals, and shipping, that should be found there, and to exert such other efforts as should be judged most proper for annoying the enemy, as by our several instructions to the commander of the said forces does more fully appear; and whereas the troops sent for these purposes are returned to Great Britain, no attempt having been made to land on the coast of France; concerning the cause of which failure we think it necessary that inquiry

should be made by the general officers hereafter mentioned; and in order that they may report those causes to us, for our better information, our will and pleasure therefore is, and we do hereby nominate and appoint our right trusty and right intirely beloved cousin and counselor Charles Duke of Marlborough, lieutenant general; our trusty and well-beloved George Sackville, commonly called Lord George Sackville, and John Waldegrave, major generals of our forces, to examine and inquire touching the matters aforesaid: and you are to give notice to the said general officers when and where they are to meet for the said examination; and the said general officers are hereby directed to cause you to summon such persons (whether the generals or other officers employed on the expedition or others) as are necessary to give information touching the said matters, or as shall be desired by those who were employed on the expedition; and the said general officers are hereby further directed to hear such persons as shall give them information touching the same; and they are authorized, empowered, and required, strictly to examine into the matters before-mentioned, and to report a state thereof as it

shall appear to them, together with their opinion thereon : all which you are to transmit to our Secretary at War, to be by him laid before us for our consideration. And for so doing, this shall be, as well to you as to our said general officers and all others concerned, a sufficient warrant.

“ Given at our court at Kensington,
this first day of November, 1757, in
the thirty-first year of our reign.

“ BARRINGTON.”

“ To our trusty and well-be-
loved Thomas Morgan, Esq.
judge advocate general of our
forces, or his deputy.”

Conformably with this warrant, the three general officers therein named, attended by Sir Charles Gould, deputy judge advocate general, assembled, and opened their business with the examination of several witnesses and papers relative to the intelligence on which the expedition was projected. They next summoned the generals, and the other officers who had been particularly employed during the expedition, in reconnoitering, &c.; in order to judge of the practicability of putting his Majesty's instructions in execution, and to learn what attempts had been made to execute these

instructions: then they called upon Sir John Mordaunt, who was commander-in-chief of the troops in that expedition, to give his reasons for not having put his Majesty's instructions and orders in execution; and, lastly, they formed an opinion (which they reported to the King) concerning the causes of the failure of the expedition.

The delicacy of his Majesty's order for this court of inquiry, in not mentioning the name of the commander-in-chief, although it appears that the inquiry was instituted purposely on his account, is not the least remarkable particular. Notwithstanding this attention, Sir John Mordaunt, in consequence of facts reported by the court of inquiry, was brought to trial before a court martial. It seems, however, doubtful whether the power given by the warrant for assembling the court of inquiry, authorized them to call on Sir John Mordaunt to explain his reasons for not fulfilling his Majesty's instructions; since herein consists one of the principal distinctions between a court of inquiry and a court martial. The latter is empowered to hear and examine witnesses on oath, on both sides; to put the prisoner on his defence; and to pass sentence on him, which is definitive. Now if a per-

son suspected of any criminal matter was to be previously examined by a court of inquiry, and afterwards brought to a court martial, this examination might produce a charge against himself, a circumstance to which Sir John Mordaunt justly adverted, when upon his defence before the court martial by which he was tried, in consequence of the report of the court of inquiry.

Although no instance of a court of inquiry on a subject of such consequence, and on an officer of so eminent a rank, occurs in our naval transactions; I submit it as an opinion—that the lords commissioners for executing the office of Lord High Admiral of Great Britain, have, in virtue of their commission, by the power delegated to them by the King, an authority (if they judged it proper and convenient to be exerted) to order a court of inquiry, even where no specific charge is laid, to investigate the cause of the miscarriage of any naval expedition or service whatever.

During a naval court of inquiry*, held at Spithead, in 1791, one of the witnesses appeared in so reprehensible and culpable a

* Composed of the following officers: Admirals Lord Hood, Hotham, Leveson Gower, Sir Hyde Parker, and Captains Onslow and Cotton.

light, respecting the part he had taken relative to the subject of their inquiry, that the court thought proper to represent his conduct to the Admiralty, as subjecting him to the judgment of a court martial, which their lordships accordingly ordered. All the officers who were members of the court of inquiry attended at the court martial as prosecutors for the crown, which prevented their sitting as members of the court martial. However, the prosecution was conducted by Sir Hyde Parker, one of the members of the court of inquiry, and captain to Lord Hood, then commander-in-chief of the fleet at Spithead.

The court of inquiry was held on the first lieutenant of the *Saturn*, for directing a midshipman to be hoisted to the masthead, who refused to go there for punishment, when ordered so to do for improper conduct and behaviour; persisting in his refusal with such resolute determination, both in words and actions, that if the lieutenant had brought him to a court martial, even his life might have been endangered. The young gentleman wrote for a court martial, and inclosed his letter to his captain, Robert Linzee. Unsuccessful in this quarter, he applied to the commanding officer of *the port*, Ad-

miral Roddam, desiring that his letter, requesting a court martial, might be transmitted to the Admiralty: their lordships, however, ordered a court of inquiry only, (at which the commander-in-chief of the fleet at Spithead presided,) *to inquire into the conduct of the first lieutenant.* By this court he was acquitted of any tyrannical or oppressive behaviour in that instance, and in his general character as an officer. But the affair, previous to the court of inquiry, was espoused by most of the midshipmen in the fleet; and several letters passed between them and the gentleman, in order to induce them to pursue and support him in obtaining the means of having the lieutenant brought to a court martial; which transaction was deemed by the court of inquiry an unlawful combination, dangerous to the discipline of the fleet. To discourage such proceedings in future, one of the witnesses examined in the court of inquiry, (Mr. Edward Moore, midshipman of the London,) was brought to a court martial on board the Royal William, in Portsmouth Harbour, at which Admiral Roddam, the port admiral, presided: the trial lasted three or four days, when Moore was sentenced to be confined one month in the prison of the Marshalsea. The sequel of

this transaction must not be omitted ; as it is calculated to lesson young gentlemen, not too hastily, and unadvised by sober minds, to pursue seeking redress in courts of common law, for supposed harsh treatment in cases of this description.

Just as the *Saturn* was about to be paid off, the first lieutenant had a writ executed against him for an assault, at the suit of the midshipman whom he had ordered to be hoisted at the mast-head : he wrote immediately to the Secretary of the Admiralty, representing the hardship and expence he should incur in defending the prosecution, particularly as he had been acquitted by the court of inquiry of being an arbitrary and oppressive officer ; and as what he had been induced to do, in support of orders and subordination, was a lenient step, compared with the punishment which might have been inflicted, had he brought the midshipman to trial before a court martial. On this application their lordships were pleased to order their solicitor, Mr. Dyson, to defend the cause ; which was discussed in the Court of Common Pleas, in Westminster Hall, before Lord Loughborough, March 1792. The evidence on the part of the prosecution being closed, those in support of the defendant (to which

were subpoenaed the captain of the ship, and all the members of the court of inquiry,) were not called upon; but the verdict was left to rest on the plain facts, which were not contradicted. His lordship, in his charge to the jury, pointedly expatiated on the necessity of supporting military officers in the due discharge of their duty, and keeping up proper discipline and subordination: and a verdict was given in favour of the defendant. The plaintiff had, therefore, all expences to pay, which were very heavy, as the time of trial had been deferred, and he had long been held in suspense.

It results, then, from the present investigation, that the intent of ordering courts of inquiry to be held is, either to throw light on particular transactions, and by the report made thereon, to judge if there are sufficient grounds to bring the parties implicated to a trial for their conduct; or to clear those who complain of aspersions cast on their characters, by persons in official capacity. Doubtless they frequently prevent an unnecessary assemblage of officers to form a court martial, which is often attended with delays, and considerable inconvenience to the public service. Courts of inquiry may be described as in some degree similar to

grand juries, who are convened in order to decide on the truth of a bill of indictment.

But in errors of naval importance seldom will recourse be had to this remedy. Not only does it prevent officers who composed the court of inquiry, but also such as might have been summoned to give testimony, from sitting as members of a court martial. The court of inquiry, while it has a tendency to extort accusations against himself from the accused, permits none of the evidence minuted in its proceedings to be produced at a court martial, where the whole must be delivered *viva voce*, as if no examination had previously been instituted.

CHAPTER IV.

OF PERSONS SUBJECT AND AMENABLE TO
THE JURISDICTION OF NAVAL COURTS
MARTIAL.

MUCH is it to be regretted, that although the utmost degree of caution and circumspection is employed in wording our statute laws, they should still be liable to a diversity of interpretation; thereby often engendering opposite opinions, as to the extent of their meaning and application. This deficiency is particularly to be lamented in that department of the constitution which relates to naval jurisdiction.

By the act of the 22d of George II. chap. 33, the naval articles of war express, “That to be subject or amenable to be tried and punished by a naval court martial, it is necessary (*except in respect to spies*) to be in *actual service and full pay*, and part of the crew *in, or belonging to the fleet*.” Hence it would seem to follow, that officers on half-pay are exempted from any pains or penalties enacted by the articles of war; nor

amenable to the jurisdiction of a court martial, even when called upon by the Lords Commissioners of the Admiralty, on the appearance or actual declaration of war, should they decline serving their country, by refusing to take up a commission that may have been made out for them. Unless, however, very cogent and satisfactory reasons are assigned for not coming forward on his Majesty's proclamation being issued for recalling all officers from abroad (who might be absent on leave, or, by permission, in the service of foreign states ; or who, within the time limited and prescribed by the Admiralty, and notified in the Gazette) omitted to transmit to the secretary of that board their names and place of abode—there is no doubt but such officers are legally liable to what the Admiralty declare they will enforce,—“ that their names shall be struck off the half-pay list ;” which was done in several instances during the armaments of 1791. It has, indeed, been supposed, that half-pay is held, not *as a retaining fee, but in reward for past services*. Were such the fact, officers could not be deprived of this emolument by the board, (which calls on them to serve,) if they disobey or neglect their directions. This

erasure of the names of officers bears particularly hard on the rank of lieutenants, who are most in request at the commencement of an armament; of whom many, unable to maintain a family on the small pittance of their half-pay, might have procured the command of merchant ships, and been established, either in the East India Company's service, or some other eligible and lucrative employ; situations which they might not regain when discharged, after an armament of too short a duration to admit either the chance of promotion in the service, or any advantage by prize-money. Such, however, among innumerable others, are the hardships and difficulties which officers must expect to experience who devote themselves to the naval service of their country.

As to the officers of a more elevated rank, either masters or commanders, captains or admirals, these being more extensive in number than the service can generally require, they are continually soliciting for employment, and are therefore under no compulsion to serve.

Until, however, some legal authority shall decide as to the opinion that officers cannot justly be deprived of their half-pay, when they decline service, on account of their receiving it from the bounty of their country,

as a reward for past merit, and not as a retaining fee, they must bow with submission to the Admiralty, when divested by them of half-pay, under circumstances already enumerated. Examples are not wanting, wherein officers, after being struck off the list, have been placed on an establishment termed the *house list*, by which they were continued in the receipt of their half-pay; in consequence of application to the Admiralty, by memorial or petition, stating the reasons for their not coming forward agreeably to the King's proclamation.

On the 5th March, 1785, a court martial, appointed to try Major General Ross, met at the Horse Guards, pursuant to adjournment. The General being called in, Lord Townshend, the president, informed him, that "the court had adjourned formerly in order to take the opinions of the twelve judges respecting their competency to try him *; that they had received a letter from

* Peers of the realm, if naval officers, are, by the statute of the 2d William and Mary, sess. ii. cap. 2. (which grants the same power to the Lords Commissioners of the Admiralty as to the Lord High Admiral,) subject to the jurisdiction of a naval court martial, and therefore must wave their privilege of being tried by their peers as lords of parliament. More than fifteen lords, spiritual and temporal, entered their protest against the passing of this act, as an infringement on their privileges.

the Chief Baron of the Exchequer, stating, that the judges had gone their circuit, and would not re-assemble till the next term, the 15th of April:" on which the court adjourned; assuring the General, that he should have timely notice from the Judge Advocate when his appearance would again be required. April 26th, 1785, the court having reassembled, and General Ross being called in, the Judge Advocate read the opinion of the twelve judges of England, on the point submitted to them; viz. whether General Ross, as an officer *on half-pay*, was subject to the tribunal of a court martial? Unanimous in their decision, the judges declared that he was not, as an officer on half-pay, subject to military law. They affirmed their answer on two points; asserting their opinion, that neither his warrant as a general officer, nor his annuity on half-pay, rendered him obnoxious to military trial. General Ross was discharged accordingly from the custody of the marshal, and the court broke up.

Respecting naval commission officers, the words "*actual service*" are clearly and perfectly understood; and it has been proved, that they are not liable to be tried by a court martial whilst on half-pay. But to

standing warrant officers in his Majesty's naval service, who, instead of half-pay, enjoy their own personal *whole pay*, and are held in constant employ, after their respective ships are put out of commission, the definition is by no means equally applicable. Generally it has been understood, by these being immediately placed under the orders and directions and controul of the navy-board, through the commissioners and officers of his Majesty's respective dock-yards, from the ships to which they belong being delivered into the charge and care of that *board*, and of the officers serving under *their* directions, by the captain of the ship, as soon as she is paid off, and the pendant struck *,—that the warrant officers belonging to the ship are no more subject to military laws, than the board or officers under whom they serve; who, although many of them are captains in the navy, yet, as their employments are of a civil nature, they are emancipated from martial law during the time they hold such offices. The ship, it is urged, cannot be deemed in actual service whilst in a state of ordinary, being dismantled; that though

* The sign and emblem of martial command.

the officers enjoy full pay, (one of the circumstances subjecting them to naval military jurisdiction,) yet this does not apply unless they are commanded by officers subject to such laws: that, therefore, they are not liable to be tried by a court martial, either for neglect of duty, disrespect, or other improper behaviour towards those under whose directions they are placed; nor can any complaint be exhibited against them for improper conduct and behaviour to officers in actual service, commanding or belonging to ships in commission: that, on the contrary, upon a regular complaint for neglect of duty, or improper behaviour, made to the commissioners of the dockyard, or to the principal officers and commissioners of his Majesty's navy, who might represent the same to the lords of the Admiralty,—it then would lay with their lordships, if convinced of the truth of the representation, to deprive them of their employment, by appointing other officers to supersede them; or, if the charge was for embezzlement of stores, subject them to an indictment at common law.

Notwithstanding that a contrary persuasion has long been entertained by many experienced and respectable officers in his

Majesty's navy, I shall here adduce an instance, in which the officers composing a court martial were satisfied of their competency to try an officer belonging to a ship in ordinary. Depending on the wisdom of the Admiralty, who would not have directed the court to be assembled had there been any doubt as to the legality of its jurisdiction, they did not, as in the army court martial, in the case of General Ross, after meeting in consequence of the orders they received for trial, adjourn from day to day, till legal opinion was given as to their competency to proceed. Probably, the person who was tried, not being sufficiently informed on the subject, made no objections to their jurisdiction. I believe there are not more than two instances of a trial of this kind since the act of the 22d of George II.

In the year 1779, Captain George Oakes, when first lieutenant of the *Pallas*, in Portsmouth Harbour, being along-side the *Launceston Hulk*, a ship in ordinary, the boatswain of that ship behaved in such a manner as to induce Oakes to make an example of him. Unmoved by the remonstrances of his friends (amongst whom was an officer, who was then commissioner of the dock-yard,) urging him to desist from his intention, on

the supposition that the boatswain was not liable to be tried by a court martial, he wrote a letter of complaint to the Admiralty against the boatswain of the *Launceston*: a court martial was immediately ordered, where he was tried, and sentenced to be dismissed his Majesty's service. The court was composed of the full number, *thirteen*; amongst whom were admirals as well as captains.

As this misdemeanour was of such a nature, that the Boatswain would, most probably, have been superseded, had it been exhibited against him without being brought to trial, no farther investigation took place. Be it also remembered, that the offence was perpetrated by a person belonging to that class of officers, who, although good seamen, and valuable men in the line of their profession, are, in general, disqualified, by their want of discrimination, either to detect an erroneous judgment or to apply for redress.

If a court martial is empowered to try officers in ordinary for one species of offence, conformably to the articles of war, it is natural to conclude they are so for every other, whether it affects an officer in commission or not. Suppose, however, the offence capital, as striking or beating a com-

mission officer; could the court, if the charge had been proved, hesitate a moment to pronounce him guilty, and pass sentence of death? For, after they had once sat, and had not demurred on the predicament in which the person they tried stood in respect to the law martial, but rested satisfied in the authority they derived from the orders of the Admiralty; how would they have felt, had it been referred to the highest legal authority (as perhaps might have been the case,) in bar to the execution of the sentence, for an opinion on the original question,—whether an officer belonging to a ship in ordinary was amenable to the martial law—and the judges of the land should have given it as their opinion, that the person condemned was not within their jurisdiction?

Should the standing warrant officers be deemed not subject to a court martial, whilst the ships to which they belong are out of commission, because they cease to be under the controul of commission officers in his Majesty's service; it may then be asked,—Is their situation altered by a pendant being hoisted on board their ships, when the officers and crew belonging to a ship in commission (and consequently under naval

military discipline) continue to reside and remain on board during the time the ship to which they belong is in dock or refitting? In some respects they must unavoidably be under the controul of the officers of the ship in commission, particularly in regard to their own boats coming or going from alongside; which, in order to prevent desertions, or embezzlement of the stores that may be on board, belonging to the ship in commission, should not be permitted without the knowledge of the officer of the watch.

I shall mention an instance of a person not cognizable by a court martial, although belonging to a ship commanded by a master and commander and a lieutenant in full pay, and acting in every respect as a ship of war. At the latter end of the American war there were several vessels hired by government on particular charters; amongst which was one found by the merchants, at so much per ton per month, but in which the owners placed a master and a certain number of men, paid by them, to bring home the vessel, in case government had no longer employ for her. This ship had been converted into an armed ship of war, and proper officers and men (for the time being) appointed to her by the commander-

in-chief in America. The master having behaved in a most improper manner, he was put under confinement, and a court martial wrote for, by the captain of the ship, to the commander-in-chief in America, who ordered a court martial accordingly. Without adverting to, perhaps not wishing to decide on the point, the Admiralty left it to the court to make their report. They assembled ; and the President, then second in command at New York, reported to the commander-in-chief, that it was the opinion of the court they were not competent to try the prisoner ; as he was not in a predicament that rendered him amenable to the jurisdiction of a court martial, because he did not receive King's pay.

The commander-in-chief was not offended at the report—as every court martial is answerable for its own act, and must abide by the consequences of illegal proceedings, although assembled by proper authority. This, however, unfortunately explained and settled a point that might as well have been left floating in the minds and opinions of men as to have been decided upon ; since it would have operated as a restraint on the behaviour of those who might afterwards be on board other ships in the same

predicament. On this occasion, however, the court martial acted with exemplary prudence. Had they inconsiderately persisted in the trial, since capital punishment would, in all probability, have been the result, and, consequently the sentence, by the orders of the commander-in chief, carried into execution;—if, afterwards, it had been determined, that the court was not competent to try the offender, the consequences originating in so unauthorized an exertion of power, must have proved not only alarming but disagreeable. Further to illustrate this point, and shew that the Admiralty sometimes grant orders, upon regular application, to try persons, who afterwards prove not to be amenable to *military jurisdiction*; leaving *that* particular to be decided on by the members of the court martial, when they come to assemble, I insert the following case:

In August, 1791, the mate of the Plymouth naval transport (a vessel employed and paid by the navy board to bring stores to Plymouth dock-yard) did, together with four of the crew, purloin and embezzle sundry stores; for which Commissioner Fanshaw, of the dock-yard at Plymouth, had the offenders sent on board the Cambridge,

the flag-ship in Hamoaze, where they were kept in confinement: as the navy-board, from Commissioner Fanshaw's representation, accompanied by affidavits of the fact, had made application to the Lords Commissioners of the Admiralty to order a court martial to try the said prisoners for such offences, which was accordingly granted. The court assembled: but when it was ascertained that the vessel to which they belonged was not in commission, and that neither the master nor men were subject to naval discipline; the court (composed of the greatest number, *thirteen members*, of whom Captain, afterwards Admiral, John Macbride was president,) drew up a report, which was signed by all the members, whereby they gave it as their opinion they were not competent to try the offenders, as they were not persons subject to naval discipline. This paper being transmitted to Mr. Stephens, Secretary of the Admiralty, he wrote to Sir Richard Bickerton, the port admiral at Plymouth, inclosing a copy of a letter from Mr. Dyson, (assistant to the council for the affairs of the Admiralty and Navy,) which was addressed to the principal officers and commissioners of his majesty's navy, and in which he affirmed his opinion, that the mate and men

belonging to the transport vessel were amenable to the jurisdiction of a naval court martial; founding his opinion on one formed by Dr. Harris, advocate of the Admiralty, in the year 1765, who stated it as his conviction, that naval courts martial were competent to try any person belonging to a ship in ordinary. Admiral Bickerton inclosed Mr. Stephens's letter, together with the law opinion, to Captain Macbride, who convened the captains that still remained in port, which had composed the court martial; they, however, having reviewed the question of their incompetency to try the offenders, continued unanimous—that *actual service* and *full pay*, as expressed in the naval articles of war, applied only to officers and men actually belonging to one of his Majesty's ships or vessels of war under a *flag or pendant*; and they proposed a case, to be laid before his Majesty's judges, wherein they stated their doubts, and intreated their lordships to give their opinions on the subject, to serve as a guide in future. The King's advocate, attorney and solicitor general, and the advocate and counsel for the Admiralty, gave it afterwards as their opinion, "that the officers and crews of any navy transport, of the

description of the Plymouth transport, *could not be legally tried* by a court martial."

The mate, and the four men of the crew, were, therefore, released from their naval imprisonment, after the court martial had declined trying them. But they were apprehended by a warrant from a justice of the peace, committed to the county gaol at Exeter, and brought to trial at the assizes: the mate was condemned to death, and the men were sentenced to be transported to Botany Bay.

This proceeding to trial in one instance, and declining to act in another, this eternal contradiction, only proves, how necessary it is, that the wisdom of the legislature should pass an act to explain and establish the real and true extent of the law of naval courts martial, and descriptive of such persons as are amenable to its jurisdiction; by a plain, clear, unequivocal, declaratory law, which should leave nothing to imagine, nothing to misinterpret.

Even in the existing articles of war, the words, "*in or belonging to the fleet,*" afford great latitude to misconstruction; and, were they not corrected and restricted by the preceding words, "*in actual service and full pay—and part of the crew,*" might implicate

every person in a ship of war, that did not belong to the service, or even captains and crews of merchant ships under convoy of ships of war: in fine, they might be construed to extend and operate, in the same manner as to followers of camps in the land service.

Yet it has ever been understood, that the words “*in or belonging to the fleet,*” apply to the officers and soldiers embarked on board any of his Majesty’s ships; not merely to such as compose part of the ship’s complement, when serving on board in lieu of marines: but likewise to those who are embarked for passage, in order to be conveyed to their place of destination. Immediately on their being received and victualled on board the ship, till the hour of disembarkation they become subject to the naval laws and regulations: no regimental court martial, however great the rank, or extensive the number of officers on board, can be held for the punishment of offenders, whilst they continue embarked; but the captain of the ship has sole right and authority, (in cases of misdemeanour,) to punish agreeably to the custom of the navy, in the same manner as the ship’s crew, or any sailor borne as a supernumerary for victuals only. The fifth

section, in the act of the 22d of George II. for the regulation of his Majesty's vessels, and forces by sea, particularly enacts.---
 "That nothing contained in this act, shall extend, or be construed to extend, to empower any court martial, to be constituted by virtue of this act, to proceed to the punishment or trial of any land officers, or soldier *on board any transport ship*, for any of the offences specified in the several articles, contained in this act." This distinction strongly implies the power of temporary punishment, and bringing delinquents to courts martial, whilst serving in, or embarked on board King's ships; as the exception states "*transport ships*," by which is understood men whilst embarked on board for a passage, either when the transport vessel may, or may not be under the convoy or charge of ships of war.

Officers who have long commanded ships which confer on them the rank of post, can but seldom experience the repugnancy, so frequently evinced by land officers, to be convinced that the naval articles of war, established by a permanent act of parliament, extend any authority over those who are embarked on board a King's ship, for a passage only. They nevertheless acknow-

ledge the power, while serving on board in lieu of marines; who (although voted as part of the navy) cease to be under the naval articles when disembarked, but are tried at quarters, by courts martial composed only of the officers of their own corps, or officers of marching regiments, who may be stationed on the spot, and in whose deliberations naval officers are not permitted to participate.

It is the lieutenants, since the year 1787, appointed to command forty-gun ships, fitted expressly to carry out troops, instead of hiring transport vessels, who have often combated with opinions of this nature; not only on the broad scale of subordination to naval laws, but on a supposition that, as the land officers embarked were sometimes of a rank superior to a lieutenant in the navy, (who ranks as a captain in the army,) they, for that reason, were not subject to his controul whilst on board ship. The Lords of the Admiralty did, therefore, in the years 1793 and 1794, promote most of the lieutenants so serving, to the rank of masters and commanders; and appointed officers of that rank, to command such class of ships, when employed in transporting troops.

Even this accession of rank to the naval

officer does not always efface the idea that several land officers have entertained, on being embarked, who ranked superior to a major or captain : however, this notion of military superiority at sea, is refuted by that part of the naval instructions relative to rank of sea and land officers, article 12, which was established by the King's order in council, dated 10th February, 1747, declaring---“ That nothing in this regulation shall give any pretence to any land officer, to command any of his Majesty's squadron or ships, nor to any sea officer to command at land.” There cannot exist two distinct authorities in a King's ship.

While naval discipline and subordination are esteemed essential to the interests and welfare of this country, the authority necessary to enforce obedience must, as it now is, remain established in the commander of the King's ship or vessel, equally in one of a ship of a small class, as in one of the first rate. The imagined right to hold regimental courts martial on soldiers, whilst embarked on board his Majesty's ships, in order to take their passage, would certainly have been long since exploded, had there not been several instances, *particularly during late years*, of some naval officers giving up the point, and

by suffering or admitting military officers to conduct themselves in opposition to the undoubted customs of the navy, taught them to demand that as a right, to which they were entitled (if entitled at all) by favour only. When, therefore, naval officers remonstrate against this innovation, and, when obstinately resisted, continue resolute in their refusal; too often does it occasion considerable misunderstanding between the two services, not merely distracting the harmony so necessary to be preserved and cherished on both sides, but productive also, of personal disputes and animosities. It is perfectly natural for land officers to infer that the laws, orders, and directions which provide for the regulation of troops, embarked on board ship, must be vague indeed, since they can be dispensed with by the naval officer in order to accommodate, or oblige the commanding officer of the troops embarked; and this whilst other officers assert, that the practice is contrary to those naval regulations, with the observance of which they can on no consideration dispense.

On this head, I shall instance a strong and convincing circumstance, that fell under my own observation, on board the Dread-

nought of sixty guns, of which I was at that time acting purser.

In the year 1764, complaints being made to ministry that the Spaniards had not complied with the treaty of peace, concluded in 1762, respecting the restoration of the log-wood cutters, to their former settlements in the Bay of Honduras, two ships of the line, the *Essex* and *Africa*, (the former commanded by the Honourable George Falconer, and the latter by the Honourable John Leveson Gower,) were sent out to Jamaica, to re-inforce the squadron under the command of Sir William Burnaby. Sir William's flag was on board the *Dreadnought*, Captain Thomas Lee, who unfortunately was afterwards lost in the *Aurora*, on her passage to India with the supervisors.

Two regiments, the 36th and 66th, were embarked on board the line of battle ships. We sailed from Port Royal in Jamaica, to the Island of Ratten ; whilst the admiral, and the commander-in-chief of the troops (Colonel Musgrave) sailed in the *Active* frigate to St. George Key, in the Bay of Honduras, to receive the earliest answer to the dispatches he had sent to the Spanish governor of the province of Yucatan, inform-

ing him that force would be employed, if necessary, to re-instate the British settlers: before, however, our arrival at Rattan, the governor had received orders from his court, to remove all cause of complaint. During the passage, or at the island of Rattan, (I do not recollect which,) some of the soldiers had disobeyed the orders of the naval lieutenant of the watch, and been otherwise insolent and refractory: the land officers were convinced they deserved punishment; but insisted, as there was a number of officers on board the Dreadnought (among whom was included the officer who then commanded the regiment, which was the 36th,) sufficient to hold a regimental court martial, that the power of punishing their own soldiers, who were not then serving on board as marines, was vested in them. Captain Lee, being well versed in the naval code, remonstrated, and read to them the article before alluded to, but which failed to convince his opponents. Upon this, he ordered all the land officers to attend on the quarter deck: the delinquents were then brought to the gangway, the naval articles of war read, and they were punished accordingly. Had the military officers not been conscious of their error, in their first resisting Captain

Lee, they, no doubt, would have complained, or remonstrated, to the Secretary of War. Men are not brought easily to relinquish advantages to which they conceive themselves rightfully entitled, and which they have been accustomed to regard with partiality.

Since the submission of land forces, while embarked on board a King's ship, to the regulations of the navy, is no longer to be questioned, it remains only to instruct naval commanders in what manner they are to enforce this right, when contested by officers of the army. Representations should, in the first instance, be made to the Admiralty, by the captain of the ship, through the medium of the Port Admiral, in order to signify the same to the Secretary at War; who might, by general orders, direct that when any troops embark on board a King's ship, they should comply and be obedient to the naval articles of war, and subject to the command of the captain of the ship, and thus prevent any disagreeable altercations and disturbances between the two services. If the articles of war are not worded so as to prevent difference of opinion, but are construed to effect by implication only; then, no doubt, it calls for the wisdom of the legislature to remedy the defect, by enacting a declaratory

clause, to explain the point in dispute. The usual orders given by the Secretary at War to the commanding officers of regiments, who have embarked on board King's ships, commanded by lieutenants in the navy for the purpose of conveying troops to their place of destination abroad, were in the year 1788, 1789, couched in the following terms :
 “ It may not be improper to have it understood, that the vessels intended to convey these regiments, are not ordinary transports, but King's ships commanded by lieutenants in the royal navy ; who are intitled to the full exercise of the chief command on board, but who will, of course, avoid interfering with the officers of the land forces in any matters of *internal regimental detail*.”

In no department of the service is the interference and jurisdiction of naval discipline more requisite, than in respect to convoys. The commander of a ship or ships of war, having a fleet of merchant-ships under his charge, certainly should possess the power of bringing captains of merchant-ships to punishment, when *wilfully or negligently*, or with the design of falling into the enemy's hands, in order to defraud the underwriters, they separate from the fleet, through inattention, or want of the due observance of signals:

or who loiter or delay, and keep astern of the fleet, to indulge the shameful practice of visiting each other at sea, by which they often part company, become a prey to the enemy, and are not only taken themselves, but by their being so captured, frequently endanger the whole convoy. Yet all, (though a national concern,) that the officer having the charge of a convoy can do, is to send up a list of such masters of merchant-ships as behave in a refractory and disobedient manner, in attending to the instructions delivered to them at the time they place themselves under his direction, and thus make their names publicly known ; by drawing out a list to send to, and be affixed up, at Lloyd's, the general resort of merchants, in consequence of which the owners of the ships, seeing how little they can intrust their property in the hands of such negligent persons, may discharge them from their employ. I was purser of the *Winchelsea*, commanded by Captain Charles Saxton (the present commissioner of the Dock Yard at Portsmouth,) when he was entrusted with upwards of one hundred sail of merchants' ships, from Jamaica. This fleet had the extraordinary and almost miraculous escape from being captured by the

combined fleets of France and Spain, in August, 1779, who were then, *unknown to us*, cruizing at the entrance of the channel ; of which we must have passed to the northward, in the night. Many of the masters of the ships, in this convoy, behaved in a most attentive and exemplary manner, and by request of Captain Saxton, wore pendants, repeated signals, and were on occasion to draw into the line of battle : whilst others of the commanders deserved the deepest censure, for their negligence during the whole course of the voyage. On our arrival at the Downs, the names of the defaulters were sent to the Secretary of the Admiralty ; who informed Captain Saxton, that his letter had been transmitted to Messrs. Benson and Long, chairmen of the *committee of merchants* trading to the West Indies : and *there the business rested !* Now, although it cannot be deemed the duty of an officer to send such notification to the master of Lloyd's coffee house, yet the earnest wish and desire of every naval commander, to render essential service to his country at large, as *far as in his power*, ought to induce him to overcome the nicety of naval etiquette in such circumstances. We encourage that culpability, which we refuse or neglect to expose.

Many naval officers, both captains and lieutenants, in time of war, or at the commencement of an armament, are employed to regulate the impress service, yet do not, at such time, belong to any ship, any more than the gangs whom they direct; in which case, though they may be deemed to be in “actual service,” and belonging to the fleet, still the words “*in full pay and part of the crew, &c.*” do not apply to their situation. How far, it might be enquired, are such officers amenable to a court martial?

By the twenty-first section of the act of parliament for the regulation and government of his Majesty's forces by sea, passed in the twenty-second year of George IIId, it is enacted—“that all the powers given by the several articles and orders established by the said act, shall remain and be in full force with respect to the crews of such of his Majesty's ships as shall be wrecked, or be otherwise lost or destroyed; and all the command, power, and authority given to the officers of the said ship or ships shall remain and be in full force as effectually as if such ship or ships to which they did belong were not so wrecked, lost, or destroyed, until they shall be regularly discharged from his Majesty's further service, or removed into some

other of his Majesty's ships of war, or until a court martial shall be held, pursuant to the custom of the navy in such cases, to inquire into the loss of the said ship or ships, &c. &c." Here, no provision seems made for the predicament of being captured by an enemy, not even in the event of the captain, his officers and crew, being confined together in the same prison ; as frequently happened to our captured officers and ships' companies in France, in the year 1794. During that time, there were instances of flagrant misconduct both in *officers* and common men ; of the former behaving with great insolence and contempt to their captain, and using every means in their power to excite commotions among the men, by language of a mutinous and traitorous tendency, to the great discredit of our navy. It has been alledged, and even insisted on by officers in the navy, that such persons were liable to be tried by a court martial, and were subject to all the penalties inflicted by the twenty-first section, as in the case of a ship wrecked or destroyed, because the term "*lost*" was thought to include and comprehend those captured by the enemy.

But, it is in reply to be observed, that no person, however personally distinguished by

rank, is, while prisoner, a free agent ; being under the controul of the power by whom he is captured, and of the country wherein he is confined ; and, therefore, that the ties which bind and hold together the reins of subordination are dissolved : which by no means is the case when a ship is wrecked, lost, or destroyed, either on the coast of a friend or ally, or on a desolate or uninhabited part of a coast or island, where the officers and crew are collected together, and qualified to act in concert. Desirable as it is that all violations of naval discipline should experience a punishment commensurate to their extent, it is equally to be regretted that the code of our maritime regulations includes not those offences to which I have just adverted. I have indeed known of an application to the Admiralty, by a captain against his first lieutenant, in the predicament last described, but I never heard that a court martial was ordered to try the offender. Legislation cannot always foresee the evils which it designs to remedy, or this deficiency would undoubtedly have been supplied.

CHAPTER V.

OF OFFICERS SITTING ON COURTS MARTIAL, BY VIRTUE OF ANY LOCAL RANK SUPERIOR TO THEIR OWN ESTABLISHED RANK, CONFORMABLY TO SENIORITY, FROM THE DATE OF THEIR COMMISSION.

THE third article of the naval printed instructions, under the head of “rank and command,” established by his Majesty’s order in council, directs that—“the first captain to the admiral of the fleet, is to take place at all councils of war, and at courts martial, next to the junior rear-admiral.”

Although it is many years since an officer of so eminent a rank as the admiral of the fleet has gone to sea, it has notwithstanding been a rule with the Admiralty, founded on the King’s order in council, of the 22d March, 1747, to appoint a first captain to the admiral commander-in-chief of the fleet in the channel service, or of one going abroad on expeditions, or on foreign stations, whenever such fleet was composed of twenty sail

of the line or upwards, which officer is also intitled to the rank of rear-admiral. Till within these fifteen year spast, this appointment never occasioned any contention or remonstrance, as interfering with the senior captains taking their proper seats at a court martial; except, indeed, in the case of the worthy but unfortunate Admiral Kempenfeldt, who perished in the Royal George (on the 29th August, 1782,) at Spithead, when he captain to Admiral Sir Charles Hardy.

For several years during the course of the war previous to 1783, the first captain to the commander-in-chief of fleets employed in channel or foreign service, has been either a rear-admiral on the list, or senior to the other captains who served in the fleet; so that his seat at a court martial could not be disputed, as interfering with the rank and place in which the members sit, by custom of seniority.

If, however, he was a junior officer to any of the members of the court, this circumstance was considered an encroachment; local rank being understood as conferred on the first captain to the commander-in-chief, to add lustre and consequence to the orders he gives in the minutiae of the fleet, agreeably to the directions of the commander-in-

chief, whose deputy in some respects, and assistant in *all*, he is presumed to be, *so long as the commander-in-chief's flag is flying* : but this distinction cannot extend to him as member of a court martial, from which the commander-in-chief is himself excluded. Acting here on his own behalf, he certainly descends to his seniority in the rank of his station, as captain ; this he does through that justice and caution invariably pursued by the rules of the navy, in not permitting any local rank (such as an established commodore, with a captain and secretary under him,) *even by the Admiralty's own appointment*, to act in presence of a senior officer : on the contrary, no sooner does the captain, commissioned as commodore, (which intitles him to the rank of a rear-admiral, while his broad pendant is flying,) join company with a ship commanded by another his senior on the list, than he no longer holds his command, whilst in company, but must strike his broad pendant. Of this, there happened a remarkable instance, previous to the action with the Dutch fleet, on the Dogger Bank, in August, 1781. The Honourable Captain Keith Stewart, an established Commodore by admiralty commission, and whose broad pendant was flying on board the Berwick,

joined the squadron under Admiral Sir Hyde Parker. Among the ships composing this squadron, was the *Bienfaisant*, (of which I was then purser,) commanded by Captain Richard (now Admiral) Braithwaite; who, being senior officer to Commodore Stewart, the latter, immediately after saluting the admiral as a flag officer, struck his pendant, and absolutely became during the action, and for the time the two ships were in company, no more than a passenger; as the captain of the ship (*Robinson*) continued in the command of the *Berwick*.

Such being the solicitude constantly exerted inviolably to preserve the functions of senior officers, in their military capacity, surely it is consistent to suppose, that the same prudential motives are not without influence, in respect to their judicial capacity also; by which it is not merely a litigated claim to professional precedence, but the honour and existence of an officer that are frequently to be decided. Here the right of sitting in judgment as a member, first ignorantly admitted, but afterwards on examination rejected, might vitiate the whole proceedings of a court martial. If the propriety of his sitting was disputed, after sentence was passed, by reason that *not only*

his rank as first captain to the commander-in-chief did not authorize him to sit, and vote above the senior captains, but likewise that he could not have had a seat as a member of that court in any other capacity, because he was an officer of too junior a rank to have been included in the number *thirteen* who composed the court, in which case he would have been excluded from sitting as a judge; this might be a strong and reasonable plea, in a superior court of justice, for the judgment to be annulled. Such in all probability would be the result, although his rank of seniority otherwise intitled him, as a captain only, to a seat in the court martial, in which capacity his opinion would have been the same; and, in that rank, called for earlier than as first captain to the commander-in-chief, without furnishing to the person tried any just plea to remonstrate, or appeal from the proceedings of the court.

Highly, then, is it incumbent on officers, to have this objection clearly understood, and so far decided upon, by legal authority, that no private opinion, from whatever superior, may have any force; but a clear and explicit *legal* regulation take place, to which every officer shall submit.

Indeed, seriously reflecting on the particular duties of the first captain to the commander-in-chief, he appears to be confined to military functions, which, far from qualifying him for the judicial capacity he is sometimes called upon to exercise, often present an obstruction to the more enlarged sphere of assisting the commander-in-chief, in the direction of the minutiae of the fleet: for which reason, it is to be wished that the first captain to the commander-in-chief, (let his rank be what it will,) in consideration of the active duties of his station, be freed *by law* from any attendance on courts martial, during such time as he continues to serve in that capacity. It is presumed, that such a regulation could not reflect any dishonour on the officer thus excluded. Before I dismiss this subject, I shall subjoin an opinion of the law officers, given in 1790, 1791, in the case of Sir Roger Curtis and Sir Hyde Parker.

Sir Roger Curtis, made a post captain on the 30th April, 1777, was appointed first captain to the Right Honourable Richard Earl Howe, admiral of the white, who, by particular commission, carried the union flag at the main-top-gallant mast-head; as commander-in-chief of the channel fleet, fit-

ted out in 1790, on the apprehension of a rupture with Spain.

The first court martial that assembled, after Sir Roger was appointed first captain to Earl Howe, was on the 22d October, 1790, on board the Royal William, at Spithead ; it was held for the trial of Lieutenant Bligh, who commanded the Bounty, off Otahietie, in the South Seas, where, by a mutiny on board the said ship, he was deprived of his command, and forced into a boat on the open sea.

The court was composed of the following officers ;

PRESIDENT,

Honourable Samuel Barrington, Admiral of the Blue.

ADMIRALS,

Robert Roddam, Esq. Vice Admiral of the Red.

John Elliot, Esq. Vice Admiral of the Blue.

Sir Rich. Bickerton, Bart. Rear Admiral of the White.

Sir John Jervis, K.B. Rear Admiral of the White.

S. Cranston Goodall, Esq. Rear Admiral of the Blue.

Sir Alex. Hood, K.B. Vice Admiral of the White.

Herbert Sawyer, Esq. Rear Admiral of the Red.

Hon. J. Leveson Gower, Rear Admiral of the White.

Samuel Cornish, Esq. Rear Admiral of the Blue.

Sir R. Curtis, Knt. 1st Captain to the commander-in-chief.

CAPTAINS,

Richard Onslow.

Robert Kingsmill.

Having honourably acquitted Lieutenant Bligh, the court proceeded to the trial of

the carpenter of the *Bounty*, who had come home with Bligh; after which, the court was dissolved. Earl Howe's flag was flying on board the *Queen Charlotte*, on the day this court martial was held.

As Sir Roger Curtis was a junior officer to about nineteen or twenty post captains then on the spot, in actual service in the fleet, it was judged proper to state to the Admiralty, the doubts the senior captains entertained, of his right to sit next the junior rear-admiral, in prejudice to their seniority. The Judge Advocate being directed by the president to state these doubts to the lords commissioners of the Admiralty, accordingly wrote the following letter—

Portsmouth, October 23, 1790.

“ SIR,

“ DOUBTS having arisen in the minds of several of the flag officers and senior captains at this port, whether a court martial assembled in the manner the last was, is legal, owing to Sir Roger Curtis sitting as a member thereof, as first captain to the commander-in-chief, in preference to many captains present, who are senior to him on the list, I am directed by the Honourable Admiral Barrington, to request the lords com-

missioners of the Admiralty, to state the case to the crown lawyers for their opinion upon the legality.

“ The act of parliament directs, that the court shall be composed of such flag officers, captains, and commanders, then and there present, who are next in seniority to the officer who presides at the court martial.

“ The third article of the naval printed instructions, under the head of rank and command, expressly states that the first captain to the commander-in-chief shall be esteemed as a rear-admiral, and take place at all councils of war and courts martial next to the junior rear-admiral.

“ It is understood, that *when these instructions were framed*, the person who filled the office of *first captain to the commander-in-chief* was, in all cases, *the senior captain on the list*.

I am, &c.

“ M. GREATHAM.”

“ Philip Stephens, Esq.

“ Secretary to the Admiralty.”

Case and opinion of counsel on the question—Whether the first captain to the com-

mander-in-chief (not being within the thirteenth in seniority on the list) had a right to compose part of the court, and to sit next the junior rear-admiral ?

The Lords Commissioners of the Admiralty directed the following cases to be laid before his Majesty's Advocate, Attorney, and Solicitor General, and the Advocate and Counsel for the affairs of the Admiralty and Navy, for their joint opinion.

Question 1st. Whether the third article in the printed instructions, so confirmed by the Order in Council, vested in first captains a preferable right to sit at courts martial, in exclusion of captains senior on the list ; or only gave them rank and place, at such courts, when their seniority as captains entitled them to sit there.

Question 2d. Supposing the said article to have vested first captains with a preferable right to sit, in exclusion to captains senior to them ; *then* whether so much of the said article as gave them that right, was not annulled or controuled, by the words of the 12th section of the act of 22d George IIId ; which directs, that courts martial shall be composed of such flag officers, captains or commanders *then and there* present, as are *next in seniority* to the officer who presides,

&c. : or at least so far annulled or controuled, as to render it necessary for the first captain to be otherwise entitled to sit, as being one of such captains next in seniority ?

And upon the whole, whether Sir Roger Curtis was legally entitled to sit as a member of the court martial lately held on Lieutenant Bligh ?

O P I N I O N.

WE are of opinion, that the third article in the printed instructions, confirmed by the Order in Council, vested in first captains a preferable right to sit at courts martial in exclusion to captains senior on the list ; and not merely a rank and place at such courts, where their seniority entitled them to sit :

We are of opinion, that the right of such captains so vested by the said third article, *was annulled* by the words in the 12th section of the statute, so as to disable them from sitting at courts martial, where their seniority would not entitle them to sit :

We are consequently of opinion, that Sir Roger Curtis was not legally entitled to sit

as a member of the court martial held on Lieutenant Bligh.

Signed,

W. SCOTT.

A. MACDONALD.

J. SCOTT.

THO^s. BEVER.

F. C. CUST.

December 11th, 1790.

Lord Hood, on hoisting his flag at Spithead, on the 12th June, 1791, to take the command of a fleet fitted out in contemplation of a war with Russia, had Sir Hyde Parker appointed to be his captain, an officer made post the 18th July, 1763; and there were then only *two* captains, who served in that fleet, senior to him in rank, as *post captains*. By his rank of *captain only*, he sat on a few courts martial: but, conceiving (as by seniority he came within the number of captains who must be called upon when courts martial were assembled) that he had a right, in virtue of his commission as first captain to the commander-in-chief, to sit next to the junior rear-admiral, he wrote a letter to Lord Hood, who inclosed it to the Admiralty, whence the following answer was transmitted to his lordship.

Admiralty Office, 24th June, 1791.

“ MY LORD,

“ I HAVE communicated to my Lords Commissioners of the Admiralty your Lordship's letter of the 22nd instant, transmitting one you had received from Sir Hyde Parker your first captain; requesting, for the reasons therein given, to be informed, whether the *first captain* to an admiral of your Lordship's rank, and commanding in chief a squadron of his Majesty's ships and vessels, equally numerous with that at present under your Lordship's command, and being, by the seniority of his commission, within the number required to constitute a court; ‘ *shall be esteemed as a rear admiral, and take place at all councils of war, and also at courts martial, next to the junior rear admiral?*’

And, in return, I am commanded by their Lordships to acquaint you, that they are clearly of opinion, that the first captain to the Admiral of the fleet, or any flag officer having a squadron of twenty sail of ships of the line under his command, being by seniority of his commission, as a captain, within the number of officers required to constitute a court martial, ought to be esteemed as a rear admiral, and take place at courts martial, as well as at councils of war, next to

the junior rear admiral; agreeable to the third article of the general printed instructions, under the head of rank and command.

I have the honour to be,

MY LORD,

Your Lordship's

most obedient

humble servant,

“ PHILIP STEPHENS.”

“ Vice Admiral Lord Hood, &c. &c.
Spithead.”

A court martial being assembled at Spithead, on board his Majesty's ship Royal William, on the 4th July, 1791, Sir Hyde Parker claimed his right of precedency to sit, agreeably to their Lordships' decision; to which the two officers senior to Sir Hyde objected. Upon this the President directed the Deputy Judge Advocate to state the same to the Lords of the Admiralty, and request that legal opinion might be taken on the subject; a letter was accordingly wrote, of which the following is a copy:

Royal William, Spithead, 4th July, 1791.

“ SIR,

“ You will please to inform the Lords Commissioners of the Admiralty, that, pur-

suant to their Lordships' order, the flag-officers and captains this morning assembled on board the said ship, for the purpose of composing a court martial, for the trial of Thomas Jones, a seaman belonging to his Majesty's sloop *Speedy*, on the charges therein mentioned; but a doubt having arisen in the minds of some of the members, whether Sir Hyde Parker (who comes within the number of persons directed by the act of parliament to compose the court) should take his seat at the court martial next the junior rear admiral, under the direction of the third article of the naval instructions, as first captain to the commander-in-chief, in preference to captains, who will also compose part of the court, and who are senior to him on the list; or whether he should take his seat as a captain, according to his seniority on the list; I am requested to desire their Lordships will be pleased to order their solicitor to state the case, for the opinion of such counsel as they shall think proper, on the questions herein under-written :

1st. " Whether Sir Hyde Parker, as first captain to a commander-in-chief, commanding twenty sail of the line and upwards, being by his seniority on the list of captains

and within the number of persons directed by the 12th section of the act of 22nd George II. to compose the court, has a right to take place at courts martial next the junior rear admiral, in preference to captains senior to him on the list; pursuant to the third article of the naval instructions, under the title of rank and command?

2. "Supposing Sir Hyde Parker, as first captain to such commander-in-chief, should be admitted to take place next to the junior rear admiral, whether or not his vote being given in that place, when there are two captains sitting senior to him on the list, is consistent with the seventh article of the naval instructions, under the title of Courts Martial, which directs, '*that the youngest member shall vote first, proceeding in order up to the president;*' and whether or not, a sentence being given in such case, may not subject the members of the court to be called on by a superior court of law, for illegality in their proceedings?"

I am,

SIR,

Your most obedient servant,

" M. GREATHAM."

" Philip Stephens, Esq.
Secretary to the Admiralty."

COPY OF THE OPINION

*Of his Majesty's Advocate, Attorney, and Solicitor General;
together with the Counsel for the Affairs of the Admiralty, on the preceding Case.*

“ HAVING considered the King's instructions, and the act of 22nd Geo. II. chap. 33, and the usage which has obtained since that act passed ; we are of opinion, that the first captain to the commander-in-chief, when a member of the court martial according to that act, has a right to take place next the junior rear admiral, and to vote according to that rank.

WM. SCOTT.

A. MACDONALD.

J. SCOTT.

F. C. CUST.”

14th July, 1791.

Sir Hyde Parker took his seat at the next court martial, and at all subsequent ones during the time he continued as first captain to Lord Hood, in consequence of this legal opinion.

Lord Hood's flag, as commander-in-chief, was flying on board the Victory at the several periods of time the courts martial were

held, wherein Sir Hyde sat next to the junior rear-admiral: but it becomes a question, whether he could have sat consistently with that rank (under the circumstances before mentioned, of two members of the court being captains senior to him,) if his Lordship's flag had been struck for a time, when absent on leave. Although the first captain to the commander-in-chief may and does enjoy the emolument of the increase of pay in virtue of his commission, during the time the commander-in-chief is absent on leave, and his flag consequently struck; yet he cannot act in any martial official capacity, as he ceases to be the organ to the commander-in-chief, whose absence occasions the command of the fleet to devolve on the flag-officer next in seniority to him, which such officer holds till the commander-in-chief returns and re-assumes it; as, therefore, the functions of his local official rank are suspended in his military capacity, it leaves ground to presume that his judicial power is also implicated.

No part of the naval general printed instructions, nor any clause or section in the act of the 22nd George II. directs that the first lieutenant to the admiral commanding

in chief, when abroad upon a foreign station, should be admitted to sit at courts martial in the room of a master and commander, when officers of that rank cannot be procured, in order to make up, (with three post captains and two masters and commanders, or four post captains and one master and commander,) the *number five*; the only number to the completion of which officers of the rank of masters and commanders *can be admitted*. Notwithstanding the clear and plain declaration and construction of the 14th section in the act of 22nd George II. this particular has been misconceived; masters and commanders have been admitted as members of courts martial, when the court was composed of *seven*; which, no doubt, if properly investigated, would have been deemed to have been illegally formed, and have vitiated their whole proceedings. And as there is no other authority, since passing the before mentioned act, by which the first lieutenant of the ship on board which the commander-in-chief has his flag hoisted, is permitted to take a seat on courts martial, I may, without presumption, venture to affirm that any court martial, on which an officer of that rank and in that predicament was admitted to sit, has

been improperly constituted; and the members are liable to be called upon by a superior court of law for the illegality of their conduct. All judicial proceedings, as to the persons who compose the court, being directed by act of parliament, no opinion or precedent can have force, or, by any implied sense or construction, operate to alter or regulate, add or diminish, what therein is so fully declared. How such an opinion, as the first lieutenant's being eligible to be called in to supply the place of a master and commander, came to be entertained, I am at a loss to imagine; although it is held by many old and experienced officers, who, probably, were desirous it should be so, in order to prevent delay in bringing offenders to punishment. I know of but a solitary precedent that seems to countenance this extravagant persuasion. In 1774, the first lieutenant of Admiral Montague's ship, who was commanding on the American station, assisted as a member of a court martial. When dictated by particular circumstances, and not directly opposed to known and established laws, some consideration may be extended towards precedents, which may occasionally instruct and guide us in situations to which no existing directions are

found applicable. Circumspection, however, cannot, in this respect, be too guarded. Precedents must not be permitted to operate against those institutions which they propose to assist; lest, when regularly investigated, they should be censured as having assumed a power unacknowledged by any legal authority. No precedent can establish that which reason and justice have disclaimed.

While discussing the subject of local rank in the navy, (which in general is understood to give the officer who enjoys it a pre-eminence of rank above that which he possesses by the established and fixed rules of precedence, conformable to the date of his first commission,) it will not be improper to observe, that this rule has exceptions, and that there are instances in the navy where a local rank degrades instead of exalting. A post-captain, commanding a sloop or vessel of war under 20 guns, for the time being, loses his rank of post, and becomes only the senior master and commander on the station; being commanded by a post-captain junior to himself whilst he retains the command of a sloop or vessel of war; agreeable to the 11th article of his Majesty's order in council, dated the 10th

day of February, 1747, by which his rank of colonel, or lieutenant colonel, is suspended, and, for the time being, he ranks only with a major in the army.

Now, since he loses his rank in a military capacity, the like, it is to be inferred, must befall him judicially,—in which character, it is presumed, he can sit only as a master and commander: therefore, if a court were composed of five members, of whom three were necessarily to be of the rank of post captains, would he (in case no more than two such officers could otherwise be found) be legally permitted to sit as a third, by virtue of the rank with which he is originally invested, but from which he was temporarily suspended?—A legal affirmative on this question might prevent many delays which now occur in the formation of naval courts martial.

CHAPTER VI.

OF PARTICULAR SITUATIONS AND CIRCUMSTANCES, WHICH EXEMPT AND EXCLUDE OFFICERS, WHO, BY THEIR SENIORITY OF RANK, ARE ENTITLED TO BE MEMBERS OF A COURT MARTIAL.

ALTHOUGH it is enacted, by the 12th section of the act of the 22nd George II. "That no court martial shall consist of more than thirteen nor less than five persons, to be composed of such flag-officers, captains, or commanders, then and there present, next in seniority to the officer who presides at the court martial," yet many circumstances occur in which it would be improper for them to act in the capacity of judges; as, when called upon as prosecutors or witnesses on either side, during the course of the trial, or when otherwise personally or materially concerned in the decision of the court.

A predicament of this nature, for which no provision is made in the act, presented

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itself in the commencement of Admiral Keppel's trial, at Portsmouth, on the 7th January, 1779; when several captains, who would have composed the court, according to their seniority of rank, were excluded on account of being summoned as witnesses, either on the part of the prosecution, or in behalf of the prisoner. The Honourable Captain Walsingham, of the Thunderer, and Captain Faulkner, of the Victory, objecting to this exclusion, the Judge Advocate of the fleet (George Jackson, Esq.) read the following case, together with the opinion of His Majesty's Attorney and Solicitor General, and of Mr. Cust thereon, to the court:

CASE.

THE act of the 22nd George II. chap. 33, section 2, enacts, "That from and after the twenty-fifth day of December, one thousand seven hundred and forty-nine, it shall be lawful for the Lord High Admiral of Great Britain, or the Commissioners for executing the office of Lord High Admiral of Great Britain for the time being, and they are hereby respectively authorized from time to time, as there shall be occasion, to direct

any flag-officer, or captain of any of his Majesty's ships of war, who shall be in any port of Great Britain or Ireland, to hold courts martial in any such port; provided such flag-officer or captain be the first, second, or third in command in such port, as shall be found most expedient, and for the good of his Majesty's service; and such flag-officer, or captain so directed to hold courts martial, shall preside at such court martial, any thing herein contained to the contrary notwithstanding." And by the 12th section of the said act, it is enacted, "That from and after the twenty-fifth day of December, one thousand seven hundred and forty-nine, no court martial, to be held or appointed by virtue of this act, shall consist of more than thirteen, or less than five persons, *to be composed of such flag-officers, captains, or commanders, then and there present, who are next in seniority to the officer who presides at the court martial.*"

Notwithstanding the words in italics, in the 12th section, the usage at courts martial has been for officers who have given evidence at the trials not to sit as members of the courts, although they were senior to others who sat, and consequently would have

sat as members if they had not been examined as witnesses :

The Lords Commissioners of the Admiralty, having lately received a complaint in writing, charging an officer of rank in the royal navy with one of the offences specified in the articles of war, which are created and set forth by the above-mentioned act of parliament; their Lordships have therefore thought fit to issue their order or warrant in writing to Admiral Sir Thomas Pye at Portsmouth, requiring him forthwith to assemble a court martial for the trial of the said officer : and it having been suggested to their lordship's, that several officers and commanders of the King's ships at Portsmouth (who, on account of their seniority, must sit as members of the said court martial, if the letter of the 12th section in the said act is conformed to) will be summoned as witnesses, either in support of the charge, or in behalf of the accused :

You are therefore requested to advise their lordships, whether in case such senior officers should be called upon to give evidence at the trial, they may likewise sit as members of the court martial? and also,

Whether the court can be legally held

without the senior officers, (who shall happen to be called upon to give evidence) in case it is necessary for their juniors to sit as members, in order to make up the number required by the statute to constitute a court?

ANSWER.

The usage of the service, is very material upon this case, for navy courts martial are evidently considered in the statutes concerning them, as known and established courts, consequently in matters not especially provided for, the settled course of proceedings must have weight.

That the characters of witness and judge are not consistent, is very obvious ; and although in the common law of England, there is no challenge to a judge, yet in the only instance we know, where judges were called upon to give evidence in a criminal case (Keyling's Rep. 12.)* it is to be ob-

* In the reign of Charles II^d, on the trial of Colonel Hacker, one of the regicides, who was tried on the 15th October, 1660, at the Sessions-house in the Old Bailey, before the court established by particular commission for that purpose, constituting thirty-nine persons to try the said offenders, Mr. Secretary Morris and Lord Annesley, two of the judges on that trial, gave evidence.

served that they sat no more during that trial.

By a strict, and literal construction of the statute of the 22d George IId. chap. 33. sect. 12. neither the prosecutor, nor the prisoner would cease to be judges. But this construction would be absurd, and the act must from common sense admit, as the usage is, that officers to whom there is a just ground of exception, or who shall have a just ground of excuse, shall not be included in the number of those of whom the court is composed ; consequently if any officer, entitled by his rank to sit, is either prosecutor, party, or witness, the person next in seniority must supply his place, and the court so composed shall be legally held, according to the intent of the act.

AL. WEDDERBURN.

J. WALLACE.

F. C. CUST.

In case of illness, officers are excused from attending as members, and the court is legally constituted without them, notwithstanding that their seniority of rank includes them in the number of which it should be composed ; provided the cause of exemption is laid in writing before the court, in which

sometimes the surgeon of the ship is examined upon oath: but the reason of the member's absence must be inserted in the minutes of the proceedings. I shall here cite Dr. Harris's opinion on the subject.

C O P Y

OF THE

OPINION OF DR. HARRIS,

Respecting the Legality of assembling a Court Martial, when any of the Officers next in Seniority to the President are unable to attend through Ill-health.

“ It appears to have been the intention of the legislature by the act of the 22d George IId, that every court martial should be composed if possible of senior officers; but though the words of the statute are, that no court martial shall consist of more than *thirteen*, nor less than *five persons*, to be composed of such officers as are next in seniority to the officer who presides, yet they never can, I think, be understood to mean, that the next in seniority to the president, who happens to be present on the same station with their ships, should all attend in order, at all events, and notwithstanding any impediment whatever; or otherwise that no legal court martial can be held: for a con-

struction of that sort, seems not only unreasonable, as well as detrimental to his Majesty's service, by rendering it extremely difficult to make a court ; but also very contrary to the general tenor of other parts of the act, which appears calculated to expedite justice as much as possible, by permitting five captains to constitute a court, and even by allowing commanders to assist, when a sufficient number of post captains, are not be found.

“ And, as I observe, that every court martial thus composed, can express power by the fifteenth section of the statute, to dispense with the presence of any member, and suffer him to go on shore (in case of illness) even after the trial is begun, there seems to be no reason to doubt, but any officer may be excused from attendance by the president and court, if a just reason is assigned before *a trial is begun*, and that they may afterwards proceed to business, if the remaining number of qualified officers is sufficient to constitute a court martial.

“ I do therefore apprehend, that Mr. M'Kenzie and the five other captains, may legally assemble and proceed as a court to try Mr. J. Kenne, if it is taken down in the minutes, that the absent senior officer has

certified the president by letter, or otherwise, of his inability to attend.

Signed,

GEO. HARRIS.

Doctor's Commons,
4th November, 1763.

If a member of the court martial should be taken ill, and obliged to relinquish his attendance, and the remaining members were not sufficient to constitute a legal court, they must suspend their functions ; but should a ship arrive, whose commander would make up the number five, (provided he was not a master and commander, in a case where two already of that rank composed the court,) then the court might admit, and swear in the new member, and proceed to trial. Since, however, all evidence at a court martial is to be given in presence of the members, as well as the prisoner, *viva voce*, and in open court ; I may venture to affirm, that reading over the whole minutes of the proceedings, previous to the new member's admittance, would not be correct or legal, but that the whole evidence must be given in *de novo*. In army courts martial, particularly if by consent of the contending parties, the

records of a former court are admitted frequently as evidence under certain restrictions and regulations. During the trial of Lord George Sackville, in the year 1760, the mutiny act (by the authority whereof the court was held) expired, and another took place. In the case of Colonel Cosmo Gordon, the evidence of witnesses who had given testimony on the trial of Lieutenant Colonel Thomas, but who were dead or dispersed, was read, and entered as part of the minutes of the proceedings *.

OF CHALLENGES IN COURTS MARTIAL.

ALTHOUGH neither the mutiny bill for the discipline of the army, nor the act of the 22d George IIId for the regulation of the navy, notice the right of a prisoner to challenge any of the members of a court martial before they are sworn, yet it cannot be supposed that he would here be deprived of a privilege, to which he is intitled in every other court.

By the common law of England, jurors only are subject to challenge. But, in courts where the proceedings are carried on accord-

* Adye on Army Courts Martial,

ing to the civil and cannon law, the judges who, like the members of courts martial, are judges of facts also, may be challenged ; and commonly, of their own accord, they decline sitting as judges in a cause, where they may be supposed to be under the least bias or partiality *.

An instance of a challenge †, to prevent an officer sitting as member on a court martial, occurred on the trial of Lord George Sackville, in the year 1760, who objected to General Belford ; having, however, by request of the court, given his reasons for this objection, they were deemed insufficient, and the General was desired to take his place. With great propriety, General Belford, notwithstanding, declined his seat. Now, although this transaction took place on an army court martial, yet I submit to the judgment and reflection of experienced naval officers, what effects would have resulted, had the challenge been made at a naval one ? Major Adye also mentions, frequent instances, whilst serving in America, as deputy judge advocate to his Majesty's troops, of challenges, made by prisoners brought before courts martial ; and says,

* 1st Coke's Institutes, fol. 294. 677.

† See Adye's Treatise.

“ he always had the satisfaction, upon submitting the matter to the court, whether the prisoner should shew cause, to have a majority in favour of his not being obliged so to do.”

To what extent the privilege of challenge may be admitted at an army general court martial, where there is no difficulty to procure a sufficient number of officers to compose and constitute a court, I shall not take upon me to determine. In the navy, with such a regulation it would be nearly impracticable, particularly abroad on foreign stations, ever to assemble a court, and proceed to trial. On particular objections made by the prisoner against any officer being sworn in, as member of a naval court martial, he should therefore be obliged to assign the reasons of his exceptions; when it should rest with the court to determine of their validity, and to decide accordingly: if in England, and the objection was of so intricate or delicate a nature as to induce them not to decide upon the subject, it would be adviseable to submit the case to the Lords of the Admiralty, and request they would be pleased to state the cause of challenge, for the opinion of his Majesty's law officers. Indeed the small number of ships on foreign stations, es-

pecially during peace, and the uncertainty when more can be collected together at one time, may frequently be a motive of waving challenges, in order not to impede the course of law and justice, and to relieve the prisoner from that insupportable state of anxiety so natural to an officer under arrest and suspension, or a sailor confined in irons. I do not recollect any naval court martial, where such challenges were made on assembling the court, previous to the members being sworn ; but I shall, nevertheless, state particular cases, wherein officers whose seniority entitles them to sit, might reasonably be challenged.

Those who have acted as members on a court of inquiry into the prisoner's conduct, should not be permitted to sit on his court martial, since they are held, in many respects, in the light of a grand jury ; and no indictor, or grand juror, can be put upon a petty jury, for the trial of the same cause, if challenged by the prisoner so indicted ; nay, if one of the indictors be returned upon the petty jury, and does not challenge himself, he is liable to be fined *.

An officer, attending to be sworn as mem-

* Hale's Hist. Plac. Coronæ, p. 309.

ber of the court martial, may be challenged by the prisoner, if under age; for by the statute of the 7th and 8th of William and Mary, chap. 32, infants; or persons under the age of twenty-one years, may be challenged as jurors.

Perhaps it may be objected, that such a case can never happen; as, by the naval regulations, no midshipman can pass for a lieutenant who does not produce a certificate of his baptism, at his examination at the navy office, that he is twenty years of age or upwards; so that, as he must be of age in order to receive his commission as a lieutenant, no doubt can be entertained of his being so qualified when he sits as captain and member of a naval court martial. Very little experience, however, in the naval service, particularly on foreign stations, from the knowledge of officers, who have served abroad, being post-captains under *nineteen years of age*, (which required not the proof that could be easily adduced, but carried evidence and self-conviction on an officer's countenance, though he might not be confirmed at that time, having been promoted abroad)—such instances, I repeat, must prove to every one the probability of the dilemma I have last stated; and I therefore

think, if an objection was made by the prisoner, where the youth of the member was so apparently striking and conspicuous, it must have sufficient weight to exclude him from a seat on such court martial. Indeed, it might happen, that the opinion and vote of an individual so circumstanced, determined the majority; and honour and life are surely too precious to be decided upon by the voice of youth and inexperience. I shall here introduce a case in which, although the officer did not challenge one of the members for being under age, he afterwards made it a plea against the sentence, (by which he was cashiered, and rendered incapable of service in his Majesty's royal navy), asserting that the court was on that account illegally composed, and therefore the judgment defective. Captain Maximilian Jacobs was deprived by a court martial, in the year 1781, for the loss of the *Defence*, off Tibbee Bar, near Savannah: and though he has not since been appointed to the command of any ship, yet, in consequence of his remonstrance and petition, he was continued on the half-pay list of post-captains, until he was removed from thence, on a promotion of flag-officers, to the list of

superannuated captains, where he remained in 1792.

An observation has likewise been made, that officers who were of age, but only acting for the time being, could not sit at courts martial. Such are officers of the rank of masters and commanders, who receive order from the commander-in-chief, on a foreign station, to take the command of post-ships, during the indisposition, or any particular service the proper captain of any of the said ships may be ordered on, by which his absence is occasioned. These could not be admitted as one of the three post-captains, in consequence of their temporary command, in cases where the number five was made up by two masters and commanders.

In the year 1782, a captain, who was acting in a post-ship at New York, attended, when the signal was made for a court martial; but was told by the president, Sir Edmund Affleck, then commodore, (with a broad pendant), that his attendance was not required, although there was not the full number—thirteen members. However, the opinion of the court was taken on the question, whether he had a right to sit or not? and they gave it as their opinion, that he had

not. This is a difficulty that requires to be determined by the highest authority, and not left to the members of a court martial.

No objection, however, can reasonably be urged against officers of age, who are appointed to command ships where there is a real vacancy abroad, but whose commissions may not have been confirmed by the lords of the Admiralty: for there is the same responsibility in them, and they are as liable to be brought to a court martial for any offence, as if they had received their confirmation; and, till superseded, they enjoy all the emolument and advantages incident to established officers of that rank. If impediments of this nature are admitted, the service must suffer; since on foreign stations, perhaps the major part of the captains might be precluded from sitting in judgment, although no court martial could be held without them. Where, indeed, a post-captain was to be tried, and any member of the rank of a master and commander, or any officer acting in a post-ship* in a precarious and uncertain vacancy, might be bene-

* Lieutenant Cross, who commanded a post-ship at Boston, in the year 1772, in the absence of her commander on leave, sat at a court martial, and took his place above the master and commander.

fitted, as the only person that could be promoted in his room, in case he should be broke; this circumstance ought, perhaps, to carry some weight in authorizing a challenge on the part of the accused. It hath ever been adjudged a good cause of challenge on the part of a prisoner, that the juror hath a claim to the forfeiture which shall be caused by the parties' conviction *.

But while individual interest in the sentence given against a prisoner constitutes good cause of challenge to a juror in a court of common law, I think that an officer, of any delicacy of sentiment, would feel repugnancy in insinuating so gross an aspersion concerning a brother officer, although his judge in such circumstances, as to suppose he would set aside the sanctity of his oath, in order to derive benefit to himself, unless he had, previous to trial, made use of any forcible expression by way of prejudging; as, that the prisoner was guilty—that he must certainly and unavoidably be broke, &c. hereby indicating feelings and views inimical towards the party accused.

The officer who prosecutes can in no case sit as a member of a court martial. In some

* State Trials, vol. i. p. 502.

particular instances, when the offence has been disrespect, or disobedience of orders, committed during the captain's absence from the ship; the lieutenant has carried on the prosecution, and the captain of the ship has sat as a member of the court martial. Notwithstanding, whenever this was opposed by the prisoner, though supported by the court, I humbly submit it as an opinion, that the challenge or objection was a good one. The captain of the ship may know more of the character and general conduct of the prisoner, than any other member of the court; may be biassed or influenced, either in favour of, or against the prisoner; and therefore, (except where the offender could not be brought to trial at all, by there not being a sufficient number, excluding his captain, to constitute and compose a court), the latter should not be admitted to a seat. So circumstanced, the delicacy only, of many officers would restrain them from acting judicially.

Considerable difficulty has sometimes been experienced, in cases, where the prosecutor *alone* could substantiate the charge alledged against the prisoner. Of this I shall state an instance, that occurred on a trial held in Portsmouth Harbour, in January 1789, on

Mr. Charles Thackeray, lieutenant of the Thorn sloop of war. Previous to trial, the Deputy Judge Advocate was requested by the officer who was appointed to assemble and preside at the court martial, to state the circumstance to the Admiralty ; and a letter was accordingly wrote, of which the following is a copy :—

Portsmouth, January 7th, 1789.

“ SIR,

“ CAPTAIN CHARLES THOMPSON, commander of his Majesty’s ship Edgar, being directed by their Lordships to assemble a court martial for the trial of Mr. Charles Thackeray, lieutenant of his Majesty’s sloop Thorn, on several charges represented in a letter from Captain William Taylor, her commander, addressed to you ; and, among others, “ for going into the captain’s cabin when alone at sea, and calling him scoundrel and liar,” which Captain Taylor *alone* can prove : and as Captain Thompson apprehends, that the court may have a doubt of the propriety of admitting Captain Taylor to give his evidence, because he is the complainant, he has directed me to

state the case to you, and request you to move their lordships to lay the same before such counsel, as they shall judge proper, for an opinion on the following questions:

“ Whether Captain Taylor’s evidence, under the before-mentioned circumstances, ought to be admitted or not? and, if it ought to be admitted—

“ Whether, after he has been examined (as it is the custom of courts martial to examine witnesses separately and apart from each other), he can be permitted to remain in court, to conduct the prosecution?

“ Captain Thompson means to assemble the court martial on Monday morning next, and hopes to be favoured with an answer before that time.

“ I am with great respect,

SIR,

Your most obedient

humble servant,

M. GREATHAM,

Deputy Judge Advocate.”

“ To Philip Stephens, Esq.

Secretary of the Admiralty.”

COPY OF THE OPINION

Of the Counsel for the Affairs of the Admiralty and Navy Board, in answer to the foregoing Letter.

“ The distinction between objection to the competency, and objections to the credit of a witness, has been long established: and in criminal prosecutions, it is not a legal objection to the competency of a witness, or to the admissibility of his evidence, that he is the prosecutor; whatever objections to his credit may arise, under the circumstances of the case:

“ The effect of the evidence when admitted, and the mode of conducting the prosecution, must be left to the judgment of the court. If the practice of courts martial, in examining witnesses separately, is so universal that it cannot be dispensed with in any case, I suppose that some agent, or attorney on behalf of the prosecutor, may conduct the prosecution; which is every day practised in courts of law.

“ If any doubt should be conceived by the judges of the court, on the propriety of receiving the evidence of a complainant, it may be proper to observe, that the *rule*

which is universal in *civil actions*, that a plaintiff cannot be admitted as a witness in his own cause, does not apply to *criminal prosecutions*, which are always supposed to be at the suit of the crown, and on behalf of the public ; and therefore objections from interest, or from want of other evidence or circumstance to confirm the testimony of a single witness, are objections only to the credit.

“ F. C. CUST.”

“ Lincoln’s Inn,
January 10th, 1789.”

This opinion of Mr. Cust’s has excited my most serious attention, especially as applying to the admissibility of Captain Taylor’s evidence, as plaintiff, or prosecutor, on part of his charge against Lieutenant Thackeray, which he *alone* could establish.

The distinction drawn between the *competency*, and the *credibility* of a witness, I clearly comprehend * ; but the difference that is made between *civil actions*, and *criminal prosecutions*, where the *rule* in the former, that a plaintiff cannot be admitted as a wit-

* See p. 132. of this Treatise.

ness in his own cause, does not apply to the latter, because it is supposed to be at the suit of the crown, &c. I must own I do not so readily understand.

As the sentence of the court martial, whereby Lieutenant Thackeray was broke, did not specify on which of the charges their judgment was founded *, perhaps the charge on which the president desired to have the opinion of counsel, might not have had any influence in forming the decision. Suppose, however, the charge of personal, but unwitnessed insult, had been the only charge exhibited by the captain against the lieutenant; in that case, how would they have proceeded? Would Captain Taylor's charge, and his single oath to prove it, have been admitted? or would the prosecution have been quashed, or dismissed, for want of evidence in support of it? The characters of prosecutor and witness have ever been held, as assuredly they ought, distinct. Here, how could the Admiralty prosecute; where the accuser is the only witness, and where all they could know of the charge must proceed from *him alone*? The Admiralty, no doubt, have power to bring officers to trial for offences, where no specific charge is laid

* See p. 130 of this Treatise.

either by a superior, or inferior officer ; but then, proceedings must originate in some action, wherein such officer, in a conspicuous and public manner, has done something reprehensible, and which can be proved by the evidence of witnesses.

It may be remarked, how is discipline to be maintained, if the officer next in command, on board a ship, shall abuse his captain with impunity, by using sly and private means to do it without a witness? To this I reply, that the service cannot be affected by what is done in so clandestine a manner ; no scandal can accrue to a commander, nor can any detriment be opposed to his authority, till such offence becomes publicly divulged. Immediately on experiencing this species of insult, did a captain order the lieutenant out of his cabin, send for the other officers of the ship, and accuse him, in their presence, of the abusive language he had used towards him ; there might then be some corroborating proof from the evidence of witnesses, as to the lieutenant's looks and behaviour, when thus confronted ; but where corroborating proofs are wanting, no officer can be safe, if liable to secret accusations. It is impossible to say, that no instances would occur, wherein malice might be ex-

erted against an officer who had become obnoxious to his superior, were such accusations, unsupported by evidence, admitted to have force ; more particularly if the offence had been passed over in silence at the time it was alledged to have happened, but was afterwards brought forward in addition to other charges.

All offences should be specifically charged, not adverting to misdemeanours formerly overlooked. Investigation should constantly be limited to the subject immediately exhibited, as strictly as in an indictment or declaration ; which will not admit of entering into any matter, that is *not therein* set forth.

It is an equitable exception to an officer sitting in judgment, that he has recently cooperated in passing sentence on a matter materially connected with the offence about to be tried ; or that he has given evidence, in the course of such former trial.

The ground of this protest is founded on the 25th of Edward III. chapter the third, which enacts, “ *That no indictor shall be put in inquests upon the deliverance of indicties of felonies, if he be challenged for that same cause by him who is so indicted.*” This exception against a juror, who found an indictment against the party for the same cause, hath

been adjudged good, not only on the trial of such indictment, but also upon the trial of another indictment or action, wherein the same matter * is either in question, or seems to be material though not directly in issue. Members of courts of inquiry, (which, I have already observed, may in some measure be compared to a grand jury) appear therefore liable to challenge as members of a court martial, if they have given an opinion, as they are sometimes directed to do, in any degree bearing on the cause for the trial whereof the court martial is convened. In the army, in cases of appeal from regimental to general courts martial, the same reasons will hold good, against any member of the former, being one of the judges on the latter. However, on the trial of Admiral Sir Hugh Palliser, in April 1779, two officers † sat who had been members of the court martial previously held on Admiral Keppel, and two officers sat likewise ‡, who had given evidence on the same trial. It does not appear that Sir Hugh made any objection; but the court was cleared previous to the members being sworn, on a motion being

* 8 Hen. 4. 2 Pl. 4. Coke upon Littleton, 157, 6.

† Capt. Adam Duncan, and Capt. James Cranston.

‡ Capt. M. Robinson, and Capt. Samuel G. Goodall.

made as to the propriety of such officers sitting as members,—which being debated, the court was opened, the audience were admitted, and the members sworn.

On the trial of Admiral Matthews, in June 1746, *fourteen* members, out of the *nineteen* of which that court was composed, had recently sat on Admiral Lestock's trial; which concluded only *thirteen* days previous to the commencement of Matthews's court martial.

Since the year 1749, when the act at present in force for the regulation of the navy took effect, I believe there never has been an instance of a captain sitting as a member of a court martial, whose ship was not on the spot, in the harbour, or roadstead, in which the court martial was held, within the district and limits of the command of the port admiral; (and not either at St. Helen's Road, or Cowes in the Isle of Wight, or in Stokes Bay) agreeable to the interpretation of the 12th section of the act, by which officers composing courts martial, are to be *then and there present*, &c. This direction is understood to apply to the ships, not less than to the commanders, although the word *ships* is not particularly inserted. The words *then and there present*, also imply officers who are

casually on the spot, at the time the court martial is ordered to assemble. Doubtless it was to prevent any purposed selection of particular officers, that the 13th clause of the said act is couched in the following words—"Provided always, and be it enacted by the authority aforesaid, that nothing herein contained shall extend, or be construed to extend, to authorize or empower the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, or any officer empowered to order, or hold courts martial, *to direct or ascertain the particular number of persons, of which any court martial to be held, or appointed by virtue of this present act, shall consist.*"

From these premises it is inferred, that no captain can sit as member of a court martial at Portsmouth, whose ship was then either at Plymouth, at the Downs, or in the rivers Thames or Medway. Yet, this inference can only be made by implication; since the words of the act are not so directly explicit as to do away what Admiral Matthews objected to at his trial, by challenging *three captains*, who were assembled in order to be sworn on his court martial, because the ships they commanded were at a distance out of the district or limits of the command of the officer who was to preside at the

court-martial, and the said captains not in the actual command of the ships to which they belonged, as officers were appointed to act in their room. These particulars being submitted to the consideration of the Admiralty, in a letter to Mr. Secretary Corbett, he returned for answer.—“ That by the act of the 13th of Charles II. for trying offences committed at sea, and which was the foundation of martial-law, no such restrictions are mentioned ; for it only states, that courts-martial shall consist of commanders and captains: that in foreign parts, courts-martial did generally consist of flag-officers, and captains of ships, *then* on the spot ; but that at home, captains of ships have often been called from other ports, to the port where the court-martial was held, when the trial has been upon officers of distinction, or has been upon any matter of great importance.” Accordingly the three captains, challenged by Admiral Matthews, were sworn in, and sat as members of his court-martial. He was sentenced, by “ the *unanimous* concurrence of the court, to be cashiered, and rendered incapable of any employ in his Majesty’s service.”

This trial commenced on the 16th June, 1746, and did not conclude till the 22d of

October following, including adjournments; occupying, in all, one hundred and twenty-nine days! If the act then in force, obliged the members not to separate, or did not permit to go on shore till the sentence was pronounced (as was the case by the act of the 22d George II. till repealed by the act of the 19th of George III.), the members had here more reason to complain of confinement, than the officers who composed the court on Admiral Keppel's trial, which continued during thirty-six days.

Should it be determined that the 12th and 13th sections of the before mentioned act, do not establish the restriction that officers entitled to sit on courts-martial must be virtually in the command of their ships, and these on the spot; then may any officer be called from any port in Great Britain, or Ireland, and leave his post, in order to contribute towards the formation of a court-martial.

Having endeavoured to state some of the most reasonable pleas, as cause of challenge at naval courts martial, it may not be altogether irrelevant to offer some additional observations on the doctrine of challenges, as practised in the courts of common law; and on the manner of impannelling a jury.

Jurors are to be challenged either by the prosecutor or complainant, or the defendant, before they come to the book, and are sworn. Challenges are of two kinds :—without cause shewn, which are commonly termed peremptory challenges ; or with cause shewn.

Challenges without cause shewn, or peremptory challenges.—By the common law, the King might challenge peremptorily as many as he thought fit, of any jury returned to try a cause in which he was a party ; but this is remedied by 33d Edward I. commonly called an ordinance for Inquests, by which it is enacted as follows :—“ It is agreed and ordained by the King, and all his council, that from henceforth, notwithstanding it be alleged by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King ; yet such inquests shall not remain unshaken, for that cause, but if they that sue for the King, will challenge any of those jurors, they shall assign of their challenges a cause certain, and the truth of the same challenge, shall be enquired into according to the custom of the court.” Notwithstanding if the King challenges a juror in a court of law before the pannel is perused*, he need not shew any

* Staunford's Pl. of the Crown 1. b. 2. let. A. State Trial, v. 2. 274. v. 3. 52. 869.

cause till the whole pannel is gone through, and it appears that there will not be a full jury without the person so challenged; and if the defendant, in order to oblige the King to shew cause, challenges *tous paravailles* *, yet it hath been adjudged that the defendant shall be first put to shew all his causes of challenge, before the King need shew any.

It was allowable also, by the common law, that a prisoner tried for felony should challenge as many as he thought fit, under the number of three full juries, (i. e.) not amounting to more than thirty-five; but by 22 Hen. 8. 14. Pl. 7. it is enacted, and by 32 H. 8. 3. made perpetual, that no person arraigned for felony, &c. be admitted to any peremptory challenge above the number twenty: still a prisoner may challenge thirty-five peremptorily, without assigning cause, if tried for treason. At present, at the county assizes, the pannel for a petty jury (so called by being a little pane or oblong piece of parchment, annexed to the writ of *Venire facias juratorus*, addressed to the sheriff, and by him delivered into court), is not to consist of less than 48, nor more than 72 names; these names are afterwards wrote on tickets, folded up and put in a box or glass, and the

* State Trials, v. ii. 52. Raymond, Ref. 473, 474.

first twelve that are taken out indiscriminately, are read over, and, as they appear, they are to compose the jury, unless challenged on the part of the King or prisoner.

Antiently, if a prisoner challenged peremptorily above the number allowed, he was to be treated as one who stood mute, or be adjudged to suffer death: if he challenge above twenty, as the law stands at this day, he shall not have judgment of death, but only his challenge shall be over-ruled, and the jurors sworn.

Challenge for cause.—It is a general rule, * that wherever the King is a party, (as he is at all courts-martial) he who challenges for cause, must shew it presently, and not have time till the pannel is perused, as the King shall, where he takes a challenge; and that after a prisoner hath challenged a juror for cause, and his cause hath been disallowed, or found against him, he may challenge † the same juror peremptorily before he is sworn, provided the number before challenged peremptorily is under the limited restriction. I proceed to shew, what are allowed by law to be good challenges, when the prisoner challenges for cause.

* Coke upon Littleton, 158. State Trials, v. 3. 235.

† 37 Hen. 6. 8. 17.

There are many causes for which a juror in a court of law may be challenged; as the want of land, free or copyhold, to the amount of £10. in England, or in Wales £6. per annum. In the courts held within the cities of London and Westminster, the juror must be a householder within the city, and have lands, tenements, or personal estates to the value of £100 *. Non-residence in the county that the prisoner hath a claim † to; the forfeiture which shall be caused by the party's conviction; or that he hath declared his opinion before hand ‡, that the party is guilty, or will be hanged, or the like: though the prisoner shall not examine such matter upon *avoir dire* § (*veritatem dicere*), that is to oblige him to answer upon oath to such questions as the court shall demand of him; because it sounds reproachable to him.

Yet it hath been adjudged ** that if it shall appear, that the juror hath made such declaration from his knowledge of the case, and not out of any ill-will to the party, it is no cause of challenge.

* 3 Geo. II. c. 25. sec. 19, 20.

† State Trials, vol. i. fol. 502.

‡ 21. Hen. VIII. Pl. 10. State Trials, vol. iv. fol. 184, 185.

§ 49 Edw. III. 1. Pl. 2.

** 2 Rolles Abridgement, 657. la. 1.

Jurors may be challenged for suspicion of bias, or partiality; which may be either a principal challenge, or to favor.

A principal Challenge is such, when the cause assigned carries with it *prima facie* marks of suspicion, either of malice or favor; as, that a juror is of kin to either party within the ninth degree*, that he has been arbitrator on either side, that he has an interest in the cause, that there is an action depending between him and the party, that he has taken money for his verdict, that he has formerly been a juror in the same cause;—all these are principal causes of challenge, and which, if true, cannot be over-ruled: for jurors must be *omni exceptione majores*. When the party hath no principal challenge, but objects merely to some probable circumstances of suspicion,—as acquaintance, particular habits of friendship, intimacy, or the like†,—these are what the law denominates *challenges to favor*.

The law allows challenges, *propter delictum*; for some crime or misdemeanour that affects the juror's credit, and renders him infamous; as for a conviction of treason, or

* Finch, 401.

† Blackstone's Com. iii. chap. 23. pag. 363.

felony, or perjury*, or conspiracy; but a juror cannot be examined upon oath, in these last causes of challenge, which are to his dishonour. Such a practice would make him either forswear, or accuse himself, if guilty; and it must therefore be proved by the party who challenges. But these exceptions cannot well occur at a court-martial: and, besides, none of them are principal challenges, though perhaps allowed by favor upon strong presumptive proof; unless the record of conviction be produced or shewn.

The whole array or pannel of a jury may be challenged, if the sheriff is a-kin to the party, or the pannel was returned at the instance of the party, or for other irregularity: but then it must be before any are sworn; for if one man is sworn, the whole array cannot be quashed.

If a peer of the realm is returned on a jury, in the case of a common person, it is a challenge to the whole poll or array; but a nobleman, if tried by his peers, cannot challenge any of them, because they are to try the cause upon *honor*.

If after a jury is gone from the bar, one

† Idem. and Coke upon Littleton, 158. Trials per pais, c. 9.

of them shall call a witness who was sworn, and had given evidence in court, and shall desire him to repeat it again, and he does it accordingly; this is a misdemeanour, for which the verdict may be set aside*. In cases of life and death, if the jury do not concur in their verdict at the assizes, they may be carried round the circuit till they agree †.

If any jury cast lots, whether to find for the plaintiff or defendant, it is a misdemeanour for which they may be fined, and the verdict set aside; for they are sworn *well and truly* to try the issue between the parties. Juries, however, are fineable only for misdemeanours ‡.

Special juries are allowed, on the requisition of either of the parties. When the Master is to strike 48 out of the freeholders' book (notice of which is given, that the attornies on both sides may be present), if only one comes, and the other not, he that appears shall, according to the antient course, strike out 12; and the Master shall strike other 12, for him that is absent§. But if, by

* Cro. Eliz. 189.

† Raymond, 193. 205. 2 Keb. 687. 697. Ladsingham's case.

‡ Raymond, 13. 8. 1. 1 Keb. 934.—938. Hard. 409. Wagstaff's case.

§ 1 Salk. 405.

rule of court, the Master is ordered to strike a jury (in case it be not expressed in such rule, that the Master shall strike 48, and each of the parties shall strike out 12) then the Master is to strike 24, and the parties have no liberty to strike out any*.

Special juries cannot be challenged peremptorily or without cause; and therefore it was held by Chief Justice Parker, in the case of the King against Macartny, for the murder of the Duke of Hamilton, that there cannot be a special jury in causes of treason, or felony; since each party must have the advantage of challenging 20 in cases of felony, and 35 in cases of high treason, without cause shewn.

Concerning foreigners it is enacted, by the statute of 28th Edward III. ch. 13, that in inquests to be taken amongst aliens and denizens, before any judges, one half of the inquest shall be denizens, and the other half aliens; if so many there be in the place, who are not parties: if not, then so many as there are; but these strangers or aliens (*per medietatem lingua*) are not required to have the regulated property of denizen jurors.

It may not be improper to suggest, whether

* 1 Salk. 405. W. & M. 8.

this mode of trial might not obtain in regulating the proceedings of courts-martial, on particular cases, where a fleet of foreign ships of war served as auxiliaries, under an English admiral commander-in-chief; whether, in his capacity as such, he could not bring foreign delinquents to courts-martial, for great and capital offences, that required immediate redress or punishment, as an example to others, whilst serving as part of combined fleets, in the same cause of quarrel? in which case, a court-martial should be composed of half English and half foreign officers. The naval code, however, being silent on this head, it has hitherto been presumed, that foreign officers, who may have been guilty of offences against the rules and discipline of war, are to be tried by their own officers; a position, notwithstanding, that might justly be impeached.

Previous to trial for capital and criminal offences and misdemeanours, before the petty jury, an indictment is preferred to the grand jury of the county, which is usually composed of gentlemen of the best figure in the county; as many as appear upon this pannel, are sworn upon the grand jury, to the amount of more than twelve, but not more than

twenty-three, that twelve may be a majority. Finding the bill is not required to be unanimous, as on a petty jury convened to pronounce on a capital offence; but on hearing evidence, and finding the bill, in which at least twelve of the jury must agree, they indorse on the back of it—" *a true bill.*" If they judged the accusation groundless, or not supported by proof, the practice was formerly to indorse it—" *ignoramus;*" but now they assert in English, more absolutely, " *not a true bill.*" So tender is our law of the lives of its subjects, that no man can be convicted at the suit of the King, of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards by the *whole* petty jury, of *twelve more*, finding him guilty at his trial. When twelve or more of the grand jury assent, it is a good presentment, though some of the rest disagree; and the indictment, when so found, is publicly delivered into court*.

Antiently it was held, that if one of the grand jury disclosed to any person indicted, the evidence that appeared against him, he

* Blackstone's Comm. vol. iv. chap. 22. page 301.

was thereby made accessory to the offence, if felony ; if treason, a principal ; and at this day it is agreed, that he is guilty of a high misprision, and liable to be fined and imprisoned*.

The yearly value of the estate of a grand juror is not determined by our laws, except in Yorkshire ; where he ought to have £80. a year, freehold or copyhold†.

But freeholders they ought to be‡, “ and lawfulliege subjects ;” neither under attainder of any treason, or felony, or an alien ; nor outlawed, whether for a criminal matter, or, as some say, in a personal action : and hence it seems, that any one who is under prosecution for any crime, may by common law, before he is indicted, challenge any of the persons returned on the grand jury, for defect of any of the qualifications aforesaid §.

Some officers, on perusal of this chapter, may think that many of the law definitions, here inserted, do not apply to naval courts martial ; and that multiplying the cause of challenge, would increase inconveniences,

* Blackstone's Comm. vol. iv. chap. 9. p. 126.

† 7 & 8 W. c. xxxii. sec. 8.

‡ 2 H. H. 155.

§ 1 Haw. 215.

instead of removing them. To those who have adopted such sentiments, from long service and experience, I bow with respectful submission. I feel confident, however, that the motives which directed this apparent digression from the subject more immediately under discussion, will not be unfairly appreciated. Explanations which were received with the highest satisfaction, by military characters, from Major Adye's Treatise on Courts Martial, cannot be excepted to by naval officers, when necessarily employed to illustrate and establish the judicial proceedings of the British navy.

CHAPTER VII.

OF A JUDGE ADVOCATE.

THE office of a Judge Advocate to the fleet is a situation of great importance; and although it is seldom bestowed on a gentleman educated in the profession of the law, yet certainly he should be conversant with every form of judicial proceeding, in the regulation of naval courts martial;—that he may be enabled (*as it is his duty,*) to advise the court of the proper forms, when there shall be occasion; to deliver his opinion on any debates or difficulties that may arise in the course of the trial; to take minutes of their proceedings, as clerk or register of the court; and likewise to be prosecutor, or counsel for the crown.

He derives his appointment from the authority of the Lord High Admiral, or the commissioners empowered to execute that office; and he has a right to constitute a deputy. The person to whom he delegates his authority, is usually bred to the law, is resident at one of the principal naval ports

in the kingdom, Portsmouth or Plymouth, and discharges the duty of this office on general occasions; but on trials of officers of eminent rank and station, (such as Admirals Byng, Keppel, Sir Hugh Palliser, &c.) the judge advocate of the fleet, unless prevented by illness, always officiates in person.

When courts martial are directed to be held in any port or harbour of Great Britain, or in Ireland, or on foreign stations, where no appointed deputy resides, the president (with the approbation of the court) is then qualified to issue a warrant to any person he may think proper, to officiate in that capacity*: which warrant is generally read in open court, before the members are sworn, or he takes the necessary oath himself; that the prisoner, prosecutor, witness, and audience, may know by what authority he acts. The person so authorised, is generally the secretary to the commander-in-chief, or the admiral who presides, or some purser of any of his Majesty's ships, supposed to be most conversant with, having been in the practice of attendance on courts martial; but this situation never is conferred on a commission officer, as in the land service.

* Section 20 of the Act 22 Geo. II. chap. xxxiii.

Strictly adhering to the *words* of the statute, the deputy judge advocate can only legally receive his appointment, from the president, when the court is composed ; that is, *after it is sworn* : yet it is usual for the president to nominate him some days previous to the trial, that he may be enabled timely to send to the party accused, an attested copy of the charge, collect the evidence in support thereof, summon the witnesses, &c. ; all which, though absolutely necessary, may be considered as extrajudicial, till some further explanation is made, by a new act, authorizing his proceedings.

The person so appointed has no official instructions given him for his conduct, but must depend on what he may have collected during his service in the navy, concerning the practice and usage at courts martial, on which he formerly acted. Still it might be supposed he could not err in essentials, while implicitly following the directions for the execution of his office, as inserted in the book delivered from the Admiralty, intitled, “ Regulations and Instructions, relating to his Majesty’s service at sea, established by his Majesty in council.” Many material repeals and alterations and amendments, however, have taken place, by act of Parliament, more than 40 years past, which are not

noticed in the latest editions of that book, printed by authority, in the year 1772 ; and delivered to the captains in his Majesty's navy, from the Admiralty, on their receiving their first commissions. Particularly defective is that part which relates to the judge advocate's duty, and by which he is there directed—"to examine witnesses upon oath, take down depositions in writing, and shew the same to the commander-in-chief, who is to order him to send timely before the trial, an attested copy of the charge or accusation to the party accused, in order to his being the better prepared for his defence."

In obedience to directions from the officer appointed to assemble and preside at the court martial, who delivers to the judge advocate the original complaint against the prisoner, there is sent an attested copy of the charge exhibited against him, with a requisition for him to transmit a list of such persons as he may be desirous to call upon in support of his defence ; who are accordingly summoned, as well as those on behalf of the prosecution ; but the judge advocate (*at least the person who is appointed to officiate as such*), cannot act in the capacity "of administering oaths, and taking depositions of witnesses" previous to the trial;—it has

long been exploded, and now is never practised.

In the year 1766, at Port Royal in Jamaica, previous to the assembling a court martial, and acting as Deputy Judge Advocate, by warrant under the hand of the Admiral *commander-in-chief* on that station, (although by the 20th section of the act of 22nd George II. which was then in the same force as at present, it is inserted, “that in the absence of the Judge Advocate, and his deputy, the court martial shall have full power and authority to appoint any person to execute the office of Judge Advocate,”) by *his* particular command, I examined witnesses, and took depositions upon oath, preparatory to a trial; which were by me delivered to him. On re-examination, *viva voce*, in the course of the trial, one of the witnesses observing that what he then said in evidence was to the same purport as the deposition I had taken, when he was previously examined by me upon oath; Sir John Lindsay, who was president of the court, expressed a strong sense of the impropriety that attended such conduct, which he reprobated in very forcible language. The depositions were never read, nor produced in court: and I know not, when a recourse to deposi-

tions was more frequent, any purpose they could answer, unless to satisfy the commander-in-chief of the necessity or grounds for granting a trial, on the complaint exhibited against the prisoner; and to prevent more witnesses being called upon to give evidence, than were necessary to prove the fact.

A Judge Advocate too frequently is considered as *a mere amanuensis*, to register the proceedings of the court; and may even give umbrage, if his knowledge of the service leads him, *agreeable to his duty*, to advise the court, should they be informal. But no body of judges seem more exposed to error, particularly abroad, where a court may be composed of junior officers, who, though desirous of administering justice with the strictest honour and impartiality, may not possess the requisite knowledge or experience; qualifications to be found only in officers who have frequently been exercised in their judicial capacity.

Much benefit, therefore, would probably accrue to the service, if a person, *independent of the navy*, was appointed to act as Deputy Judge Advocate, attached to fleets serving abroad on foreign stations, at a permanent and regulated salary. As to a large

fleet, employed on particular expeditions, whose uncertainty of a fixed station rendered it necessary to have a person properly qualified for this office to be embarked on board ship, in such case it would not be so inconvenient if a person in a civil employment in the fleet had the appointment; provided he received, from the Judge Advocate of the fleet in England, a code of instructions, which should contain, besides directions for the mode of procedure at courts martial, extracts or copies of opinions given by the several departments of the law, to which reference had been made, either by the Lords of the Admiralty, or the presidents of different courts martial. A volume of this kind, would furnish rules for any exigencies which might occur; it would act as a precedent, by which the court might regulate their conduct, in perplexing circumstances; and, exhibiting the fountain at which the Judge Advocate imbibed his opinion, it would impart weight and influence to his representations.

Members being seated according to seniority, and the audience and prisoner admitted, the Judge Advocate (or the person officiating as such) is to read the order by which the court is directed to assemble, and then the order which authorises him to act;

after which, he is to administer the oath to each member, by reading it aloud, who is to repeat it after him: and then the President is to administer the oath to the Judge Advocate. This being accomplished, the Judge Advocate is to read the charge against the prisoner, before all the witnesses then in court; after which they are to leave the court, except the first to be interrogated, and remain in waiting till called upon to give testimony. Witnesses sworn, the court proceeds *.

The Judge Advocate is to take notes of the whole proceedings of the court, except such part as may be deemed more conversation than evidence; or any question that may be asked, or answers given, which, by the direction of the court, shall not be judged material to be inserted in the mi-

* It is proper here to observe, that members of courts martial are but once sworn, at their first assembling, notwithstanding that they may continue to sit for several days, on the trial of different offenders. In this respect, there is a similarity between them and the judges of the land, who have the oaths administered to them once only; but in their capacity of jurors, they differ from those on trials in courts of law, these being sworn on every separate trial.

Forms of the oaths will be inserted, when the proceedings of army and navy courts martial are hereafter contrasted.

minutes. But this omission must be done publicly *in open court*; for nothing, if once wrote, can or ought to be expunged but in that manner. He is to transmit a copy of his minutes to the Secretary of the Admiralty; or, if abroad on a foreign station, through the medium of the commander-in-chief. After the court is closed, the opinion of its members is taken by the Judge Advocate, beginning with the junior officer; the sentence is then drawn out, and approved and signed by the members: the court is now re-opened, audience and prisoner are admitted, and the Judge Advocate, by the President's order, reads the sentence aloud. The original sentence is delivered to the President, who immediately transmits the same to the Secretary of the Admiralty, or to the commander-in-chief, if the court is held by his order.

No part of the act for the regulation of the navy, &c. directs the mode of trial of prisoners, when charged with the same crime; and yet the difference of admitting persons, charged with the same offence, to be tried together, or separately, is very obvious. Admitted in court together, they hear all the evidence, which may be useful to them on their particular trials, be as-

sistant to each other, and is certainly the means of shortening the proceedings: for judgment may be pronounced, although the punishments differ, or even some be acquitted; and may be inserted in one sentence *. On the other hand, if they are tried apart and distinct from each other, no evidence given on the trial of any other of the offenders can be admitted, but the whole must be repeated or given again, *viva voce*, in open court; and then judgment also must be awarded separately to each offender, before proceedings are entered upon for the next succeeding trial.

However, as the law of challenges in courts martial cannot be carried to such an extent as in the courts of common law, this point may not be so material to a prisoner here, as at a trial on land; where if offenders are all included in the same indictment, and they should not all agree in the same challenges, but each of them severally take advantage of the number they have the privilege by law to challenge peremptorily, then

* See sentence on twenty seamen of the *Narcissus* for mutiny and sedition, 25th May, 1782. Court martial held at New York—six ordered for execution, two corporally punished, others acquitted.

they must be tried separately*. This was the case on the trials of Lord Preston, Mr. Elliot, and Mr. Ashton, for high treason; who were tried separately, because his Lordship would not give up his privilege of challenging the jurors to the number the law allowed. Therefore it may be presumed, that at a court martial, where no challenges were made, it would be left to the prisoners, whether to be tried together, or distinctly and apart from each other.

There is likewise no part of the articles of war, by act of the 22nd George II. or of the naval instructions, which enjoins the delivery of a copy of the sentence, or minutes of the court martial, on requisition, to the person who is tried; nor is there any notice of his right to demand it: yet it has been customary to grant a copy of the sentence, particularly in cases of acquittal, on foreign stations. Nevertheless, as the act of parliament, and the naval instructions, are the only authorities supposed to regulate such proceedings, it is doubtful, from their being silent on this subject, whether, on application to the Admiralty, (whence only they can be procured, as the original sentence and

* See State Trials at the Old Bailey, 16th Jan. 1690.

minutes are there deposited,) permission would be granted for the delivery of a copy of such sentence.

In the army, the person tried has a right to the copy of the sentence, and minutes of the proceedings of the court; for the 9th article of the act for punishing mutiny and desertion, which is annually renewed, states, that on demand being made, either by the party tried, or any other person on his behalf, the copy of the sentence, and minutes of the court martial shall be delivered, (upon paying reasonably for the same,) at any time after, but not sooner than three months after trial, if in Great Britain or Ireland; nor sooner than six months, if the trial was held at Gibraltar; nor sooner than twelve months, if tried in any of his Majesty's dominions beyond seas, or in foreign parts; after sentence given by such court martial, whether such sentence *be approved of, or not,*

OF COUNSEL.

No barrister at law, nor any other person trained to the bar, is permitted to plead at a court martial, either in support of the

prosecution, or in defence of the prisoner. Trials, however, being held in open court, and free admission granted to persons either in a civil or military capacity, so long as the crowd is not inconvenient to the members; in this light, a counsellor is admitted into court, as part of the audience. The necessity of recurring to his advice, (as *amici curiæ*) either by the prosecutor, or prisoner, but more particularly the latter, in cases of moment, often both to ask and reply to such questions as may be put, frequently induces the court to grant the gentleman known to be a counsellor the indulgence of a chair and table, and pens, ink, and paper; and he is placed close to the prisoner, who may advise with him in a private manner, and state his questions and answers accordingly. The counsel is also at liberty to take notes of the trial, which may prove of great service and assistance to the prisoner.

As few gentlemen of legal ability are willing to be retained on courts martial, except for trials of a very extraordinary nature, great expence is unavoidably incurred by the prisoner who engages counsel. Uncertainty as to the time when trial will commence, and as to the period of its duration, render professional assistance, the pur-

chase of *enormous fees*, wholly unattainable by the generality of officers. Indeed, the President of the court is always regarded as counsel for the prisoner. He it is, who never omits to admonish him as to the propriety or impropriety of the questions he prefers; who interferes to prevent him from unnecessary self-crimination; who faithfully directs him both to with-hold or withdraw those precipitate discoveries, either by question or reply, which might contribute to his personal injury. Such, in fact, must ever be the distinguishing characteristics of a tribunal of honour. It is a tribunal which naturally respects the characters even of those it may be compelled to impeach; and which cannot contemplate, without unfeigned regret, the disgrace of men with whom its members have been accustomed to associate, perhaps in habits of esteem and friendship.

CHAPTER VIII.

OF ARRAIGNMENT, AND ITS INCIDENTS.

ARRaignMENT is the act of calling an offender to the bar of the court, to answer the matter wherewith he stands charged* ; which, being made in writing, is read by the Judge Advocate openly, and termed the charge against the prisoner. In this arraignment, the law directs† that every person ought to be used with all the humanity and gentleness consistent with the nature of the process ; that he is to be freed from any terror or uneasiness, other than what is unavoidably inflicted by a sense of guilt, or the misfortune of his present circumstances ; and therefore, that he is not to be brought to the bar in a contumelious manner, though accused of the highest crime‡—as, with his hands tied together§,

* Hale's Hist. Pl. Coronæ, c. 28.

† Hawkins's Pl. of the Crown, b. ii. c. 28. f. 1.

‡ Hale's H. P. C. c. 28.

§ Bracton de Legibus et Consuetudinibus Angliæ, b. iii. f. 137.

or any mark of ignominy and reproach, nor even with fetters on his feet* ; unless there be some danger of his escape, or rescue. The body of the prisoner being thus exempted from painful restraint and confinement, his mind is presumed to be more at ease, in order to deliberate on the means of his defence.

On the arraignment of a criminal in a court of common law, he is called upon to hold up his hand while the indictment is read to him; but at a court martial this ceremony is not required: nor, indeed, is it indispensable in a court of common law. Even here, if the prisoner refuses only to hold up his hand, but confesses that he is the person named, it is fully sufficient† ; the crime of which he stands accused, is then distinctly read to him, and the question, “ Guilty, or not guilty?” put to him by the clerk of the court; when he will either *stand mute*, or confess the fact, by pleading to the indictment or charge. The several pleas to which a criminal may resort, are enumerated in the next chapter. I shall here consider the incidents to the arraignment; *viz.*—standing mute, and confession.

* Idem. Blackstone's Com. b. iv. chap. 25. page 317.

† Blackstone's Com. b. iv. c. 25. page 318.

If a man, being put upon his trial, says nothing at all, “in cases of felony the court ought,” says Lord Chief Justice Hale*, *ex officio*, “to empannel a jury, and swear it, as an inquest of office; to enquire whether he stands mute, *ex visitatione Dei* (of the act of God), or of malice.”

In like manner, if a prisoner, brought before a court martial, stands mute, the president and members might then be sworn to make the same inquiry; as few felonies, however, are submitted to a military tribunal, the custom of holding up the hand, or of answering or replying to the charge, by pleading guilty or not guilty, is not practised at naval courts martial. Holding up the hand being only the prisoner's acknowledgment that he is the identical person arraigned, this acquiescence, at a court martial, is implied by his cross-questioning the evidence in support of the charge; in which case he cannot be regarded as mute. And as the question put to a prisoner, by the clerk of the arraigns, in trials for felony at common law, of guilty or not guilty, is not asked the prisoner by a Judge Advocate, even in cases of murder; he can only be deemed mute

* Hale's Hist. Pl. Cro. 317.

and contumacious, if, in the course of the trial, he asks the evidence against him no questions; or when called to make his defence, makes no reply. In this predicament, though the form of pleading to the arraignment (guilty or not guilty) is omitted, the court will proceed to judgment, on the evidence in support of the charge, and give sentence; in the same manner as is practised on one who is mute and silent in a court of common law.

Should the accused be found mute by the act of God*, the court† are to inquire—whether the prisoner be the same person, and of all other matters touching the felony, which he might have pleaded in his defence; for, since it is not his fault that he did not plead, there is no reason why his trial should be in a more loose and summary manner, or any way less regular or solemn, than if he had pleaded. Whether judgment of death can be given against a prisoner who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined‡.

As it is rather uncommon to meet with criminals who stand mute through what the

* Hale's H. P. C. 317.

† Hawkins's Pl. of the Crown, b. ii. c. 30. f. 7,

‡ 2 Hale's P. C. 317.

law terms “the act of God,” I shall insert a remarkable instance of one, who may be said to have been so circumstanced. A deserter from the Prussian service being unexpectedly overtaken by those sent in pursuit of him, whilst he was merry making with some peasants, the alarm had such an effect on him, that, after having made a loud cry on the first assault, he became quite stupified, and suffered himself to be led away without making the least resistance. When he was afterwards brought to trial, he could not be prevailed upon, by any means, to speak a single word ; but was as immoveable as a statue, and did not appear even to comprehend any thing that was said or done to him. Being committed to prison, he neither eat, drank, or slept, nor had he any manner of evacuation : neither threats, promises, nor prayers, could draw an answer from him, but he still remained motionless, as if destitute of all sensation. At last, his irons being knocked off, he was led out, and desired to go where he would. He, however, could stir neither hand nor foot, insensible to what was passing around him ; and, after remaining twenty days in this state, he fell down dead.

As to the prisoner’s standing mute of

malice, he may be said to do so, when, upon being arraigned, he makes no answer at all ; or answers impertinently, or foreign to the purpose, or refuses to put himself upon his trial as the law directs*. But after a man hath confessed himself guilty, or pleaded, and put himself upon his trial†, he is not deemed to have stood mute on account of his *subsequent* silence ; but the trial proceeds, and judgment is given as in common cases. By the 33d of Henry VIII. 1 and 2, it is enacted, that “ notorious felons, who are openly of ill fame, and will not put themselves in inquests of felonies, shall have strong and hard imprisonment, as they who refuse to stand to the common law of the land ;” but this was not to be understood of such prisoners as were taken up on slight suspicions.

Judgment of *peine forte et dure*, or strong and hard punishment, as recited by Hale‡, was,—“ That he be sent to the prison from whence he came, and put into a dark lower room, and there to be laid naked upon the bare ground, upon his back ; without any clothes, or rushes under him, or to cover him,

* Hawkins’s Pleas of the Crown, b. ii. c. 30. 1. 1.

† Hale’s P. C. 225.

‡ Hale’s Hist. Pl. Cor. 219.

except his privy parts; his legs and arms drawn and extended with cords, to the four corners of the room, and upon his body laid as great a weight of iron, as he can bear, and no more: and the first day he shall have three morsels of barley bread, without drink; the second day, he shall have three draughts of standing water, next the door of the prison, without bread; and this to be his diet, till he die."

While so dreadful a law continued in force, and the humanity of the times had not permitted it to glide into disuse and oblivion, it is astonishing that any person should stand mute, and subject himself to torture and certain death, rather than put himself upon trial, by which means he might have a possibility, however slight, of escaping punishment; or when, if even he should be convicted, an easy death would terminate his sufferings. Merely from obstinacy and caprice, perhaps a few may have incurred the worst of punishments; but a regard to their posterity (their landed property, in case of standing mute, being preserved to them; whereas upon a conviction of felony, it became forfeited,) most probably actuated the greater number of persons, who persevered in their refusal to answer to an

arraignment. In the reign of Queen Elizabeth*, a Mr. Calvery, a gentleman of good family in the north of England, being a man of violent passions, conceived a jealousy against his wife; which, by some unfortunate accident, was turned into so frantic a rage, that, early one morning, he murdered her, by splitting her skull with his battle-axe; he then forced her seven children, had by him, to leap off the battlements of his castle, into the moat that surrounded it, when they all stuck fast in the mud, and were suffocated with the slime on the water. Mounting his horse, he galloped towards a farmer's cottage, where one of his children, an infant at the breast, was at nurse. Whilst upon the road, he was ruminating in gloomy and horrid satisfaction, on his approach to the only object now wanting to the completion of his jealous revenge: the moon on a sudden was darkened, he lost himself in the midst of a thick forest; the thunder of heaven, which now stunned his ears, seemed to war against him, and summon him to judgment; and the pale lightning, appaling his soul, was, to his frantic imagination, the fire of

* Upon this tragical tale is founded a play, called "The Yorkshire Tragedy," supposed to have been written by Shakspeare.

hell, preparing punishment intolerable, and tortures excruciating, to millions of ages. He stopped, relented, repented; he surrendered, and submitted himself to justice. After having made his peace with heaven, for the murder of his wife and children, he was agonized by the thought of his having deprived the only child rescued from destruction, even by the immediate interposition of Providence, of the estate and dignity of his ancestors; and of leaving to his unoffending offspring, instead of its due inheritance, poverty, and the infamy of such a father. He considered, when convicted, that his estate must go to the crown; that, with his own hand, should he anticipate the stroke of justice, it must also become forfeited: he therefore *stood mute*, upon being arraigned, and submitted with satisfaction to the penalty attending his conduct; and persevered in bearing the most excruciating pain, with the patience of a proto-martyr, till he expired. He was satisfied, that such a death had preserved the estate for his child!

To the credit of this age, and the honour of our present Sovereign, this severe mode of proceeding, from which not even a peer of the realm could be exempted, was laid aside by authority of parliament; it being enacted,

by the statute of the 12 George III. chap. 20, “ That any person *standing mute*, upon their arraignment for felony or piracy, and not directly answering to such felony or piracy, shall be convicted thereof, and the conviction have all the same consequences, in every respect, as if such persons had been convicted by verdict or confession of such felony or piracy, and judgment had been thereupon awarded.”

In regard to confession; this may be either express or implied.

Express confession, is when a prisoner directly confesses the crime he is charged with*; which is the strongest conviction that can be, and may be received after the plea of *not guilty* is recorded, notwithstanding the repugnancy†. On simple and explicit confession, the court have merely to award judgment; but it is usually very backward and reluctant in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract, and plead‡. Where life is at stake, the court is ever very tender in giving judgment hastily. If, therefore, a

* Staunford's Pleas of the Crown, 142. let. C.

† Keeling's Rep. of Div. Cases, p. 11.

‡ Hale's H. P. C. 225.

person actually avows himself guilty, and unadvisedly discloses the special matter of the fact, erroneously* † supposing that it does not amount to felony, whereas it really does; the Judges, on probable grounds that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record it, and suffer the person to plead *not guilty*.

Implied confession, is when a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits of it, by yielding to the King's mercy, and desiring to subject himself to a small punishment; in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession or plea, the defendant shall not be estopped‡ to plead *not guilty* to an action for the same fact, as shall be where he absolutely§ pleads guilty.

* Blackstone's Com. b. iv. p. 324.

† 11 Hen. VI. c. 65.

‡ 9 Hen. VI. 60. a.

§ Idem.

OF PUNISHMENT NOT INFLICTED BY THE
SENTENCE OF COURTS MARTIAL.

THERE is no court (similar to a regimental court martial in the army) for inflicting punishment on the common sailors and marines, &c. serving on board his Majesty's ships and vessels of war, for the commission of petty offences and misdemeanours. The sole right of punishment, in these cases, is vested in the captain of the ship, or, if he is *absent on leave, or service*, in the first lieutenant: and many offences that might be brought before a court martial, are, through the captain's lenity and humanity, punished in the slight and cursory way which is the accustomed practice of the navy; in order to save the delinquent from the more severe decision of the sentence, as well as not to be constantly applying for a public trial, which is often attended with delay and inconvenience to the service. By preventing the frequent recurrence of courts martial, their respectability is likewise preserved; that awe and dread which such a tribunal is calculated to impress on the minds of seamen, and by which they will continue to be influenced, so long as men are brought to trial

on solid and assured grounds; the punishment inflicted becoming a beacon to warn and deter others from pursuing the same course, and getting a-ground on the shoals of disobedience. Sometimes it has happened, when going to receive punishment, (after the captain of the ship has thoroughly investigated the nature of the offence, and heard, though not on oath, the evidence in support of the charge against the prisoner, and what he can say, or bring by witnesses, to invalidate the same,) that the prisoner has, at the gang-way, appealed to the captain, and requested his punishment might be suspended; and that the offence whereof he was deemed guilty, might be referred to a court martial. But it is certainly in the discretion of the captain, whether he will comply with such a request: otherwise most men would, in order to avoid immediate chastisement, hazard a greater, that might be inflicted by postponing the present evil; especially when there appeared no probability, for a length of time, of there being a number of ships on the station sufficient to form a court. Therefore a demand or request of this kind, is seldom or ever complied with: it would be a great hurt to the service, by keeping men a long time in confinement,

and losing the benefit of their labour and assistance in the necessary duties of the ship, and it would render them remiss in the discharge of their several functions, which require every spirited and immediate exertions; exertions which derive much of their vigour from a knowledge, that an assured, perhaps instantaneous punishment, awaits the idleness or neglect of those employed in naval occupations.

In the land service, complaints made by any inferior officer, non-commission officer, or soldier, against the captain, or other officer commanding a troop or company, are redressed by a regimental court martial; and either party may, if he thinks himself aggrieved, appeal from such sentence to a general court martial: but if the appeal appear to be vexatious and groundless, the person so appealing, is punished at the discretion of the said general court martial*. This remark I have made, to shew how cautious the army is in appointing general courts martial; although they are here assembled with much less difficulty than in the navy.

* Land Articles of War, Sect. 12. Art. 2.

CHAPTER IX.

OF THE PLEAS OF WHICH A CRIMINAL MAY
AVAIL HIMSELF.

THE plea usually offered on the arraignment of a prisoner, who neither stands mute, nor confesses, is that of *not guilty*, or *the general issue*, by which alone he can receive his final judgment. Whatever special matter a man may have to urge in his justification, it cannot be put in by way of plea, but he must plead the general issue, *not guilty*; and give this special matter in evidence, which if true, will in effect amount to the general issue, and render the person *not guilty*, as clearly and effectually as if it were specially pleaded*.

But there are special pleas, in bar of the charge, of which the prisoner may avail himself. Such are that of *autre fois acquit*†,—that he has already been tried and acquitted of the crime he stands accused of; or that of *autre fois attaint* or convict,—that is, having already been attainted or convicted

* Blackstone's Com. b. iv. p. 333.

† Blackstone's Com. b. iv. chap. 26. p. 329.

thereof. These, called pleas in bar of the indictment or charge, are certainly sufficient to intitle him to be discharged, if he can produce the record of his acquittal, or conviction, or even good evidence to prove it; by exhibiting either the original proceedings and sentence of the court martial, which are lodged at the Admiralty Office, or regular and authentic copies thereof; or by procuring some of the members of that court to take an oath to the fact: for although the minutes and sentence are deposited at the Admiralty, yet a prisoner may be in some part of the world where they are not attainable. The latter indulgence is particularly necessary, as there is no clause in the act for regulating the naval force of this kingdom, which states that a prisoner may demand, and is intitled to a copy of the minutes and sentence of the court martial held upon him; while in the land service, by the ninth and tenth articles of the act for punishing mutiny and desertion, this provision is explicitly made. As a man is not to be brought more than once in question of his life*, for one and the same offence; so, by the 12th article of the act for punishing mutiny and deser-

* Staunford's Pl. of the Crown, 101. Let. E.

tion, no officer or soldier, convicted or acquitted of any offence, shall be liable to be tried a second time for the same offence; unless in the case of an appeal, from a regimental to a general court martial. Though the act for regulating the navy is silent in this particular, there is no doubt but the justice of the restriction applies equally here; and that if a new trial is ever granted, it can be only on the ground of fresh or new information having been obtained in *favour of the prisoner*, and which could not have appeared on a former trial. But after acquittal in a criminal case, a new trial cannot be granted.

Acquittal as a principal* forms no bar to a subsequent prosecution, as an accessory; because such acquittal clears only of the charge of having committed the fact,—a crime as different from that of receiving or abetting the principal, as if they were offences that bore no manner of relation to one another†. Yet it has been asserted‡, that the acquittal of a man, as a principal, is a good bar to a subsequent prosecution of

* Hale's P. C. 244.

† Hawkins's P. C. b. ii. c. 35. sec. 11.

‡ Staunford's P. C. 44. Let. C. 105. Let. A. B. Hale's P. C. 244.

him as an accessory before, such accessory being in some measure guilty of the fact; therefore that an acquittal, which clears a man from being guilty of the fact, doth consequently clear him from being accessory. This position, however, has been ably contested*, and successfully refuted. Finally it is agreed that acquittal† of a man, as *an accessory*, either before or after, places no bar to a subsequent prosecution against him *as a principal*‡.

A *pardon* may be pleaded fully in bar, at once destroying the end and purpose of the indictment; by remitting that punishment, which the prosecution is calculated to inflict§.

There are several other pleas which a prisoner may make. For example: that he has been confined, or suspended for an offence for which his superior officer had released him, promising to overlook it, without exhibiting a complaint, or writing for a court martial; but, notwithstanding, that in a general charge he has brought forward this

* Keelwood's Rep. 107.

† Crompton's Just. of the Peace, 43. 80.

‡ Crompton's Just. of the Peace, 43. Pl. 30. Hawkins's Pleas of the Crown, b. ii. c. 35. sec. 12.

§ Blackstone's Com. b. iv. p. 331.

particular offence, although he had not been guilty of any crime of that description since he had been released. An officer may be long under arrest or suspension, before opportunity offers for his being brought to a court martial, or even a complaint being exhibited against him in writing to the proper authority, who is to direct a court martial to assemble ; in which interim, assuaged by his contrition, and entertaining a due sense of the inconvenience he labours under, the captain of the ship may decline writing for a court martial, and permit the offending person to return to the performance of his duty. Even after a letter is wrote for a court martial, instances have occurred of the prosecutor or complainant having been permitted, by the commander-in-chief, to withdraw his accusation. However harsh it may seem, to insinuate that an officer is liable to inconvenience for his humanity, I am compelled here to observe, that he lays himself open, from evil dispositions or hardened minds, to a prosecution for false imprisonment. In occurrences of this nature, it would therefore not be improper to be guarded against accidents, by obtaining from the prisoner a written acknowledgment of his fault, declaring the obligation he is

under to his captain, for his lenity in releasing him from arrest or suspension, without subjecting him to a court martial.

I do not wish it to be understood as a clearance from, or prevention of any future trial, that a sailor or soldier is released out of irons, in order either to assist in navigating or using his exertion, in times of essential danger, for the safety of the ship; or that he is released to go to his quarters, to defend the ship against the attacks of an enemy: I hope, however, that such cases would afterwards strongly intercede for the compassion and kindness of a court martial.

With regard to these several special pleas in bar, it will be necessary generally to remark, that although in civil actions, when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another, if that be determined against him; yet in criminal prosecutions, *in favorem vitæ*, when a prisoner's plea in bar is found against him, still he is not concluded or convicted thereon, but he may, notwithstanding, plead the general issue of not guilty*. The law, while it allows many pleas by which a prisoner may

* Hale's P. C. 239.

escape that punishment, admits but one in consequence whereof death may be inflicted; viz. the general issue, after an impartial examination and decision of the facts*.

Another plea, which may sometimes be resorted to by a prisoner, is that of *jurisdiction*. If a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions; or brought to a court martial, when not of the description of persons there amenable:—on these, or similar objections, which presume the incompetency of his judges, he may except to the jurisdiction of the court, and refuse to answer to his arraignment.

* Blackstone's Com. b. iv. p. 332.

CHAPTER X.

OF THE DISTINCTION BETWEEN PRINCIPALS AND ACCESSARIES, AND THE MEANS OF BRINGING OFFENDERS TO TRIAL.

AS the process of bringing offenders to trial, whether principals or accessaries, by exhibiting a charge *in writing* to the Lords Commissioners of the Admiralty, or the officer who commands in chief, on a foreign station, is not the immediate business of the court martial, but of the prosecutor or complainant, I shall mark the distinctions between the principals in, and accessaries to, a crime.

Here it appears necessary to observe, that where a felony is committed by divers persons, the same man may be both principal in, and accessory to it*; as where *A* incites *B* to commit a crime, and afterwards

* Hale's Pleas of the Crown, 219. Kellway's Rep. 107.

joins him in the fact. I shall endeavour to shew,

1st. When he may be deemed a principal;
and,

2d. When an accessory.

Antiently it was the most prevalent opinion*, that such only were to be judged principals in felony, who actually perpetrated the fact; in murder, those only who gave the blow; in a rape, those only who actually ravished the party; and that those in company, who were only present, and abetting, or encouraging the doing of it, were to be deemed accessaries, *or at most principals in the second degree only*. But according to the present laws, all those who assemble themselves together†, with a felonious intent, the execution whereof causes either the felony intended, or any other to be committed; or with an intent to commit a trespass‡, the execution whereof causes a felony to be committed, and continuing together, abetting one another, till they have actually carried their design into execution; and also those who are present§, when a felony is com-

* Plowden's Com. 996.

† 11 Hen. IV. 13. Pl. 30.

‡ Hale's Pleas of the Crown, 216, 217. Staunford's Pleas of the Crown, 40. cel. D. E.

§ 2 Institute, 182.

mitted, and abet the doing of it, as by holding the party whilst another strikes, or by moving him to strike, or delivering a weapon to him who strikes*; these are all principals in the highest degree, in respect to such abatement, as much as the person who does the fact, which, in judgment of law, is as much the act of them all †, as if they had *all* actually done it; but if there was malice ‡ in the abettor, yet none in the person who struck the party, it will be murder in the abettor, and only man-slaughter in the other.

In like manner, any sailor in his Majesty's service, who shall persuade or entice another to desert, or to commit any other crime contrary to the code of naval military laws, will perhaps be found more deserving of punishment, than he who actually commits the crime: for the 16th naval article of war, makes it capital to intice others to desert.

By the third article of the seventh section of the army articles of war, under the head "Quarrels, and sending Challenges," any commission or non-commission officer, commanding a guard, who knowingly and willingly suffers any person whatever to go out

* Hale's Pleas of the Crown, 216.

† Plowden's Com. 98. 100.

‡ Hawkins's Pleas of the Crown, b. i. c. 31. f. 49. to 54.

to fight a duel, is punished as a challenger; and all seconds, promoters and carriers of challenges, in order to duels, are deemed as principals, and punished accordingly, that is—*cashiered*. Though the naval code is not equally express on the subject of duels, because it is presumed no such combats can take place on board ship, doubtless that offence is implied by the 22d article; which enacts, “That any person in the fleet who shall strike his superior officer, or draw or offer to draw any weapon against him, being in the execution of his office, shall be punished with death; and that he who shall quarrel with his superior officer, shall be punished according to the offence, by the sentence of a court martial.” The 23d article enacts, “If any person in the fleet, shall quarrel or fight with any other person in the fleet, or use reproachful or provoking speeches or gestures, tending to make any quarrel or disturbance, he shall, upon being convicted thereof, suffer such punishment as the offence shall deserve, and a court martial shall impose.” But no mention is made of promoters or carriers of challenges being deemed principals.

To make an abettor a principal*, it is

* Hawkins's Pleas of the Crown, b. i. c. 29. f. 8.

enough, that the person committing the fact, is encouraged and emboldened to it by the hopes of present and immediate assistance from the abettor, whether he be within view or not of the transaction*.

Persons who by accident are barely present, and, merely passive, neither any way encourage, nor endeavour to hinder or apprehend the offender, are not considered either as principals or accessories: yet, if of full age, these are highly punishable for their negligence, both in not endeavouring to prevent† the felony, or apprehending the offender; and if they any way signified their assent‡ to the felony, they may be punished as principals, because they could not but give encouragement to it. By the 20th naval article of war, it is made a capital crime for any person in the fleet, who is present at a mutiny, if he does not use his utmost endeavours to suppress it; or if, coming to the knowledge of any mutiny, or *intended mutiny*, he does not, without delay, give information thereof to his commanding officer.

* Hale's Pleas of the Crown, 216, 217.

† Dalton's Country Justice.

‡ 108 Noy's Rep. 537. Staunford's Pleas of the Crown.

Secondly.—In what cases a man is to be deemed an accessory.—The law, be it observed, distinguishes between an accessory before, and an accessory after the fact. As to those deemed accessories before, it is agreed*, that whoever by hire, command, counsel or conspiracy, or shewing† an express liking, approbation, or assent to another's felonious designs, abet or encourage him to commit it, but are so far absent‡, when he actually commits it, that he could not be encouraged by the hopes of an immediate help or assistance from them, are, all of them, accessories before the fact, both to the felony intended, and to all other felonies which shall happen in, and by the execution of it; if they do not expressly retract, and countermand their encouragement|| before it is actually committed.

If the felony§ be the same in substance which was intended, and varies only in some circumstances, as in respect to the time or place at which, or the means whereby, it was committed, the abettor of the intent, is alto-

* 2 Inst. 180. Hale's Pl. of the Crown, 217.

† Inst. 182. Plowden's Comment. 475. b.

‡ Staunford's Pl. of the Crown, 40. Let. D. E.

|| 3 Inst. 51. Hale's Pl. of the Crown, 217, 218.

§ Plowden's Com. 2 Hale's Hist. Pla. Cor. 617.

gether as much an accessory, as if there had been no variance at all between it, and the execution of it. As when a man advises another to kill such a one in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poison him, and he stabs him; or if a sailor advises another to desert at one time, and he does it at another; or to betray one gate of a town to the enemy, and he betrays another.

But if a man commands or advises a person to commit a particular felony, and he perpetrates another*; as, to burn the house of *A*, and he burns the house of *B*; or to steal an ox, and he steals a horse; or one sailor or marine belonging to the fleet incites another to desert, and he mutinies; in such cases the adviser is not accessory, because the act done, varies in substance from what was commanded or excited.

He who barely conceals a felony, which he knows to be intended, is guilty only of misprision of felony, and not judged an accessory†: but by the naval articles of war, in cases of mutiny and sedition, the barely concealing of it, is *made capital*, as was before observed. Now, with regard to those

* Hale's Pleas of the Crown, 217. Plowden's Com. 475.

† Staunford's Pleas of the Crown, 37. Letter C.

cases wherein a man may be deemed at accessory after the fact: he may be deemed such, by receiving one who was accessory before, as well as by receiving a principal*: any assistance whatsoever† given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, will make the receiver an accessory after the fact; as where one assists a felon with money or victuals, to support him in his escape; or where he or she harbours or conceals‡ a felon under pursuit, by reason whereof the pursuers cannot find him; and much more, where any one harbours in his house, and openly protects such a felon, by reason whereof the pursuers dare not take him. It is nevertheless necessary, that a man knows of the felony, in order to make him accessory by receiving such felon§.

Any person who shall be accessory to desertion, by harbouring, concealing or assisting any deserter from his Majesty's service, *knowing him to be such*, is liable, by the 53d

* Staunford's Pl. of the Crown, 43. Let. D. Lambert's Just. of the Peace, b. ii. c. 7. f. 291.

† 2 Institute, 183.

‡ Hale's Pleas of the Crown, 218.

§ Staunford's, 4. Let. E.

article of the act for punishing mutiny and desertion, upon conviction by the oath of one or more credible witnesses, before any of his Majesty's justices of the peace, to a fine of *five pounds*, to be levied by distress and sale of the goods and chattels of the offender; and in case of a default of sufficient goods and chattels, to be committed to the common gaol; there to remain, without *bail or main-prize*, for the space of *three months*, or be publicly whipped, at the discretion of the justice. The act of 22d year of George the II. for regulating his Majesty's naval forces, specifies no penalty for harbouring or concealing deserters by any *person on shore*; probably from the difficulty of knowing a sailor in his Majesty's service (by reason of his not wearing any particular habit of distinction), from one who belongs to a merchant's ship. Were it proved, however, that any one had abetted or concealed a deserter, *knowing him to belong to one of his Majesty's ships*, might not such a person be deemed to come under the penalties enacted by the Mutiny Bill? This bill, though calculated and intended for the regulation of land forces, expresses, "*any deserter*" from his Majesty's service, without inserting the word *land*: might it not, therefore, without any stretch of inter-

pretation, be made applicable to both services?

Respecting the trial of accessaries it must be observed, that if one man charged with being a principal is acquitted* of the crime, another charged with having been accessory to it shall be discharged, for in law—*Ubi factum nullum, ibi fortia nulla* †.

In bringing offenders, whether principals or accessaries, to trial, according to the ordinary practice of the courts of law, they must be first arrested, or apprehended; secondly, imprisoned, or discharged upon bail; thirdly, indicted ‡.

Offenders against martial law are to be dealt with nearly in the same manner; for by the mutiny bill§, all officers, both civil and military, are authorized to apprehend soldiers. But the act for the regulation of the navy is silent, as to the duty of civil magistrates in regard to apprehending straggling seamen, &c.; though there is no doubt, when pointed out by an officer, as deserters, they can claim their assistance, *if necessary*,

* Hale's Pleas of the Crown, 221.

† 4 Coke's Rep. 436. Staunford's Pleas of the Crown, 47. Let. E.

‡ Hale's Hist. Plac. Cor. c. 10.

§ Act for punishing Mutiny, &c. Art. 51.

to secure them. Articles of war, in the land service*, direct that whenever any officer or soldier shall commit a crime deserving punishment, he shall, if an officer, be put under arrest by his commanding officer; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court martial, or lawfully discharged by *proper authority*. The same method is by custom practised in the navy, though not laid down in the act for its regulation: for though the bill for punishing mutiny and desertion in the army makes no mention of any offender being admitted to bail, it has long been customary in the navy, as well as the army, that when the accusation against an officer is not of a capital nature, he is generally allowed to walk about the ship at large, (the quarter deck excepted) without a sword. As imprisonment previous to conviction, is only for safe custody, and not for punishment, in that anxious interval, between the commitment and trial, a prisoner ought to be used with the utmost humanity; nor should he be subject to any other hardships than such as are absolutely requisite for the purpose of *confinement only*; unless where he is

* Sect. 16. Art. 16.

unruly, or has attempted an escape*. A delicate sense of honour, a gentlemanly and generous feeling, ought always so far to influence the captain of a ship, as to induce him to lay aside all personal rancour or animosity towards an officer, and never permit him to confine him to his cabin, in the *strict sense of the word*,—which might be very pernicious to his health, particularly in a warm climate. Confinement may otherwise be rendered more grievous than the punishment that a court martial would inflict.

The length of confinement, as well as its severity, should be considered. By the land articles of war, no officer or soldier, put in arrest or imprisonment, shall continue in his confinement more than eight days; or till such time as a court martial can be conveniently assembled†. In the navy, the extent of the time of confinement, previous to the trial, is not ascertained; from the difficulty that may occur in getting a sufficient number of ships together so as to enable or authorize a court martial to be assembled. However, by the 23d section of the act re-

* 2 Institute, 381. 3 Institute, 34. Blackstone's Com. v. 4. p. 297.

† Sect. 16. art. 17.

lative to the government of the navy, it is enacted, “ That no person or persons, *not flying from justice*, shall be tried or punished by any court martial, for any offence to be committed against this act; unless the complaint of such offence be made in writing to the Lord High Admiral, or to the commissioners for executing the office of Lord High Admiral for the time being, or any commander-in-chief of his Majesty’s squadrons or ships, empowered to hold courts martial; or unless a court martial to try such offender shall be ordered by the said Lord High Admiral, or the said commissioners, or the said commander-in-chief, either within *three years* after such offence is committed, or within *one year* after the return of the ship, or of the squadron to which such offender shall belong, into any of the ports of Great Britain or Ireland, or within *one year* after the return of such offender into Great Britain or Ireland.”

It is not intended that the office or officer possessing the power to order courts martial to be assembled, shall at discretion keep in arrest or confinement any officer or mariner for the term of *three years*, under an idea of being within the time limited by act of parliament for bringing offenders to justice; but

that speedy and immediate justice and redress shall be administered, in as short a space of time as the nature of the case will admit: so long as there are not ships in company sufficient to compose a court; or the assembling a court martial does not so far delay and impede the public service, as to become an object of national concern. Otherwise, through pique or animosity against the offending party, a commander-in-chief, on a foreign station, might find a plea to decline ordering a court martial, within the prescribed limits, to what period of time he might judge proper; and the party suffer confinement for a longer space, before his innocence or guilt was proved, than what could be inflicted by the sentence of a court martial, even were the offence of such a nature as to render a sentence of imprisonment applicable thereunto. The act of the 22d George II. section 3d, enacts,—“ That no person convicted of any offence, shall, by the sentence of any court martial to be held by virtue of this act, be adjudged to be imprisoned for a longer term than the space of *two years*.” This determination relieved the navy from a great oppression; for before the passing of this act, courts martial had used their discretionary power with a high hand,

and carried their licence to punish by imprisonment to a great extent, sentencing officers for 10 or 15 years, nay some for life, to be confined in the prison of the Marshalsea.

But the discretionary power of ascertaining the proper time to assemble courts martial, is lodged in the breast of the commander-in-chief, as a sacred deposit, not to be unnecessarily prolonged. I shall record an instance of an extraordinary portion of time, that elapsed between suspension and trial, in the case of Captain Evelyn Sutton, commander of his Majesty's ship *Isis*. He was put under arrest and suspension by Commodore Johnstone, and deprived of the command of his ship, on the 22d April, 1781, in Port Praya Road, one of the Cape de Verd Islands; for supposed offences, committed on the 16th of that month, the day of the action between the British squadron, and a French one commanded by Mons. de Suffrein. After suffering innumerable hardships and difficulties, being kept under suspension from the command of the said ship, and conveyed on board her, in that situation, to the East Indies; and after separation from the Commodore, who would not bring him to trial, though there were

ships enough in company, he returned from India to England; as no charge, or witnesses to support a complaint, had been sent with him to Sir Edward Hughes, the admiral commanding in chief in India. He was released from this cruel suspension by the sentence of a court martial, concluded at Portsmouth on the 11th December, 1783, which honourably acquitted him of the *whole charge* brought against him by Commodore Johnstone; after laying under suspension and public opprobrium for the space of *two years, and two hundred and thirty-four days!*

Privation of liberty is of itself far from a trifling punishment; when attended with severity and dishonour, it must be almost insupportable. It ought therefore to be made of as short a duration, and conducted with as much ease to the prisoner, as possible. Till legally convicted, every man is presumed innocent, and certainly ought not to be exposed to penalties which the law might not exact even of the guilty.

Indictments, unless (as before remarked) the opinion of a court of Inquiry may be viewed as an indictment, are unknown to martial law.

CHAPTER XI.

OF EVIDENCE AND WITNESSES.

AS it is a settled rule, in cases of life, that no evidence can be given except in presence of the prisoner*, it becomes necessary to inquire into four material points.

How many witnesses are required in criminal cases?

What is to be allowed as evidence?

Who may be witnesses, and who are exempted from being so?

In what manner the witnesses are to give evidence?

How many witnesses are required in criminal cases.—Before the 1st Edward I. no certain number of witnesses was required upon the trial of any criminal whatever†, but by that statute, and the 1st and 2d of Philip and Mary, c. 10, two witnesses are required in cases of treason; and in cases of felony also. It seems to be the present practice in courts

* State Trials, v. 4. f. 277. 310.

† Keeble's Rep. pl. 3. 68. p. pl. 7.

of law, as well as at courts martial, to procure two or more witnesses, if they can be had ; but, where more cannot be found, *one* positive evidence to facts : and, indeed, strong presumptive proof has been often deemed sufficient to condemn a criminal, though he absolutely denied the fact. The latter, however, must be warily allowed ; for, as Lord Chief Justice Hale most humanely observes, “ it is better that five guilty persons should escape unpunished, than that one innocent person should suffer *.”

What is to be allowed as evidence in criminal cases.—As no court martial can be called upon to decide on any private wrong or injury sustained by any officer or seaman, so as to give or award pecuniary damages to the party aggrieved, all charges against the prisoner are here held as criminal prosecutions ; which are always supposed to be at the suit of the crown, and on behalf of the public. The evidence is of two kinds ; either that which is given in proof, or that which a jury may receive by their own knowledge. Evidence in proof (to which, in common speech, the name of evidence is usually confined) is either written, or parole—that is, by word of mouth. Written proofs

* Hale's H. P. C. 289, 290.

are—records, ancient deeds of thirty years standing, which prove themselves ; but modern deeds, and other writings, must be attested, and verified by parole evidence of witness : and the general rule, that runs through all the doctrine of trials is, that the best evidence the nature of the case will admit, shall always be required, if possible to be had ; but if not possible, then the best evidence that can be had, shall be allowed. If any better evidence is discovered, than what was produced, the *not producing it* is a presumption that it would have detected some falsehood, that at present is concealed *.

Positive proof is always required, when, from the nature of the case, it appears that it might have been obtained : but, next to *positive* proof, *circumstantial* evidence, or the doctrine of *presumptions* must take place. When the fact itself cannot be demonstratively evinced, that which comes nearest is the proof of circumstances, which, either *necessarily or usually*, attend such fact ; and these are called *presumptions*. Violent presumption is many times equal to full proof, those circumstances appearing which *necessarily* attend the fact ; and *probable* presumption,

* Blackstone's Com. v. 3. p. 368. cap. 23.

arising from circumstances *usually* attending the fact, hath also its due weight. But *light* or rash presumptions, have no weight or validity at all *.

The law of England allows or permits one witness to be sufficient to prove a fact, where no more can be had, and, to avoid all temptation to perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa*; whereas in the civil law courts, as there must always be two witnesses to prove a fact, they call the testimony of one, though clear and positive, *semi plena probatio* only, on which no sentence can be founded. But in *this* predicament, and in order to make up the necessary complement of witnesses, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and administer what is called a suppletory oath; and if his testimony happens to be in his own favour (which is natural to expect), this immediately converts this half proof into a whole one: thus satisfying, by an ingenious though absurd device, the forms of the Roman law, and at the same time acknowledging the reasonableness of the law of England †.

* Blackstone's Com. v. 3. p. 371. cap. 23.

† Blackstone's Com. v. 3. p. 370, 371.

The confession of the defendant himself, whether taken upon an examination * before justices of the peace, in pursuance of the 1st and 2d of Philip and Mary 13, or of the 2d and 3d of Philip and Mary 10, or taken by the common law before a secretary of state, or other magistrates, for treason, felony, or other crimes not within these statutes; or in discourse with private persons †; hath always been allowed to be given in evidence against the party confessing, but not against others ‡. It is an established rule, whenever a man's confession is made use of against him §, that it must be *all* taken together, and not by parcels.

Depositions taken by a witness before a justice of the peace, may, at the *prisoner's desire*, be read at the trial, in order to affect the credit of the witness; by shewing a variation between such depositions, and the evidence given in court *viva voce*. For the same reason, where a witness at one trial, varies from his own evidence at another, in relation to the same matter ||, such contradiction may be produced in evidence, to invalidate his testimony at the second trial.

* Hale's Pleas of the Crown, 102. 262.

† Dyer's Rep. 215. pl. 50.

‡ State Trial, v. 3. f. 89.

§ Hawkins's Pl. of the Crown, b. 2. c. 46. f. 5.

|| State Trials, v. 2. f. 343. 528.

The examination of an informer, taken on oath *, and subscribed by him † before justices of the peace, on a commitment for felony, may be produced in evidence at the trial for the same felony, if it be sworn, to the satisfaction of the court, that such informer is dead ‡, or unable to travel §, or detained by procurement of the prisoner, and that the examination offered in evidence is the very same that was attested before the justice, without any alteration whatever; but it is not sufficient to authorize the reading of such examination, to make oath that the prosecutors have proved unsuccessful in endeavouring to find the witness.

With regard to *hearsay* testimony—what a stranger has been heard to affirm—this, strictly speaking, forms no manner of evidence for, or against the prisoner ||; not only because it is not upon oath, but that the other side has no opportunity of a cross-examination; and therefore it should never be admitted, but by way of indictment, or in illustration of what is properly evidence. Yet what a prisoner ¶ has been heard to say

* State Trials, v. 1. f. 265.

† Hales P. C. 262, 263.

‡ Hales P. C. 262.

§ Keeling's Rep. of divers Causes, 55.

|| State Trials, v. 2. f. 332. 414. 761. 802. v. 3. f. 145. 209.

¶ State Trials, v. 3. 254.

at another time, may be adduced in evidence, in order either to invalidate or confirm the testimony which he gives in court.

The comparison of hands is no evidence * of a man's hand-writing, in any criminal case, whether capital or not, except the papers are found in his custody ; yet, undoubtedly, the testimony of witnesses, well acquainted with the prisoner's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury † : nor could it fail of having weight with a court martial.

Since it is not without manifest reluctance that courts of law ever admit depositions, or other written papers, or hearsay, as evidence, when *viva voce* witnesses can be procured, it behoves courts martial to be equally cautious. The jurisdiction of the latter being limited to military persons, they have no authority to summon any others as witnesses ; while in a court of law there is a process to bring them in, by writ of subpoena : and from this want of power in courts martial, they are often obliged to give greater latitude to evidence ; its credibility, however, remaining subject to the opinion of the court.

* State Trials, v. 3. f. 892.

† Blackstone's Com. v. 4. p. 352.

Words are generally to be understood in their usual and most known signification ; not so much regarding the propriety of grammar, as their general and popular use. Where two laws evidently oppose each other, the more recent one takes place of the former*, upon the known maxim—*leges posteriores, priores contrarias abrogant*.

Whatever is given in evidence, must be the very fact or point at issue, either on one side or the other, and no other evidence ought to be allowed ; nor should collateral matter be introduced, unless conducive or introductory to the main point.

Respecting such evidence as jurors may have in their own consciences, by a private knowledge of facts, it was an antient doctrine, that this had as much right to sway their judgment, as the written or parole evidence delivered in court ; consequently, that though no process were produced on either side, yet that a verdict might be returned : for the oath of the jurors, to find according to their evidence, was construed to be according to the best of their knowledge. This doctrine was gradually exploded ; and the practice now is, that if a juror knows any thing of the matter in issue, he

* Blackstone's Com. v. 1. p. 59.

be sworn as a witness, and give his evidence publicly in court*. Should the circumstance occur at a court martial, that a member (who is *judge*, as well as jury) was called on to give evidence, he could not, after being a witness, be permitted to sit as a judge during the remaining part of the trial, or have a vote † in awarding judgment.

Who may be witnesses in criminal cases, and who are exempted from being so.—All witnesses who are of an age to ascertain the solemnity and effect of an oath, and who are in possession of their reasoning faculty, are to be received, and examined ; except such as are infamous, or such as are interested in the event of the cause : all others are competent witnesses ; though the jurors, from circumstances, will judge of their credibility. Interested persons may be examined upon *avoir dire*, if suspected to be secretly concerned in the event ; or their situation may be proved in court, which is the only method of supporting an objection to such as are *infamous*, for no man can be examined to prove his own infamy ‡.

A husband and wife being as one, and

* Blackstone's Com. v. 3. p. 374.

† See page of this Treatise.

‡ Blackstone's Com. v. 3. p. 370.

the same person in affection and interest*, can no more give evidence for each other, in any case whatever, than for themselves ; as they would contradict the maxim in law, that *nemo in propria causa testis esse debet*. Regularly, the one cannot be admitted to give evidence against the other ; by reason of the implacable dissensions which might be caused by it ; from the danger of perjury, in taking the oaths of persons under so great a bias ; and the extreme hardship of the case ; besides that such a proceeding would oppugn another maxim, *nemo tenetur seipsum accusare* ; yet exceptions have been allowed to this general rule, in cases of imperious necessity †.

Though the exception to kindred is generally a good cause of challenge against a juror, it is otherwise respecting a witness ‡ : the father may be a competent witness for, or against his son, or *é converso* ; the master for his servant, or, *é converso*. Exceptions may, indeed, be made to the credit or credibility of such witnesses, but they are not exceptions to their competency. It may here be observed, once for all, that the exceptions to a witness are of two kinds.

* Coke upon Littleton, 66. 2 Rolle's Abridgement, 686. pl. 4.

† State Trials, v. 1. fol. 265. 269. Case of Lord Audley.

‡ 2 Hale's H. P. C. 276.

First.—Exceptions may be had to the credit of the witness, which do not disable him from being sworn, though they may blemish the credibility of his testimony. In such case the witness is to be allowed, but the credit of his testimony is left to the jurors, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness and his testimony ; and these exceptions are of so great variety and multiplicity, that they cannot be reduced under rules or instances. Secondly—exceptions may be made to the competency of a witness, which exclude his testimony ; and of these exceptions, the court is to be the judge.

Conviction of treason *, of felony †, of piracy ‡, of premunire §, perjury ||, of forgery on the 5th of Elizabeth ¶ ; judgment in attain, for giving a false verdict ** ; or in a conspiracy at the suit of the King †† ; judgment, for any crime whatever, to stand in the pillory ‡‡, or to be whipt or branded, being in a court which had a jurisdiction §§ ; these are good causes of exception against

* Mod. Rep. 16.

† Raymond's Rep. 148.

‡ Rolle's Abrid. 686.

§ Coke upon Littleton, 66.

|| Idem.

¶ Hen. VI. 55. pl. 45.

** Coke upon Littleton, 66.

†† 33 Hen. VI. 55. pl. 45.

‡‡ Salkeld's Rep. 689

§§ Syderfin's Rep. 51. pl. 16.

a witness, *while they continue in force* : but no such conviction or judgment can be made use of, unless the record be actually produced in court *. General is the rule, that a witness shall not be asked any questions, the answering to which might oblige him to accuse himself of a crime ; and that his credit is to be impeached only by regular accounts of his character and reputation, and by proofs of particular crimes of which he never was convicted †.

A witness is bound by oath to disclose the truth, the whole truth, and nothing but the truth. He is at liberty, notwithstanding, to answer or not any questions, which he may consider as a matter of opinion ; for although he is obliged to relate facts, yet he is not under the necessity of giving his judgment upon them as to their operation, which is the province of the court.

Whipping is a punishment never adjudged in the common law courts, except for crimes that carry infamy along with them, and render the sufferer an incompetent witness. But the necessity of supporting military discipline often renders this punishment unavoidable, on sailors and soldiers, for mis-

* State Trials, v. 1. f. 268.

† State Trials, v. 3. f. 256. 680.

demeanours, and other small crimes, which cannot be termed infamous; and therefore it *cannot* render them incompetent witnesses, though they may perhaps appear incredible ones. Although judgment of the pillory infers infamy at common law, yet by the civil and canon law it is no infamy; unless the cause for which the person was convicted, was infamous. It is not merely standing in the pillory (it hath been determined) that disqualifies the delinquent from afterwards giving his evidence, but it is standing there for some infamous crime: if so punished for a libel only, the libeller may still be heard as a witness, and even in other cases, where he is pardoned *.

Outlawry †, in a personal action, is not a good exception to a witness: and a person convicted of felony, who is admitted to his clergy, and burnt in the hand ‡, is re-enabled to be a witness.

The King's pardon § under the great seal, for treason or felony, after a conviction or attainder, restores the party to his credit; and Lord Chief Justice Holt || is of opinion,

* 5 Mod. 16. 74.

† Coke upon Littleton, 6. 6.

‡ Hawkins's P. C. 62. c. 39. f. 129.

§ Hawkins's P. C. 6. c. 37. fol. 47, 48, 49.

|| Salkeld's Rep. 514. 689.

that the King's pardon will remove a man's disability to be a witness, in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment; as it is in conspiracy, at the suit of the King. Sir Matthew Hale * thinks, that one convicted of conspiracy, perjury, or forgery, may be a good witness, if pardoned.

In all cases, it is a good exception, that a witness is to be either a gainer, or a loser by the event of the cause; whether such advantage be direct and immediate, or consequential only. Yet it appears, from daily experience, that a person beaten †, and generally any other person to whose damage ‡ a criminal information concludes, is a good evidence in a court of law, to prove such battery, or other misdemeanour; notwithstanding the objection, that he may have an action: and in courts martial, inferior officers are admitted as evidences against a superior, though likely to gain promotion by his conviction.

In some cases, although a consequential benefit to a witness does not disable him

* Hale's Hist Pl. Cor. 306.

† Rolle's Abridg. 685. pl. 5.

‡ Syderfin's Rep. 237. pl. 5.

from giving testimony, yet it may abate the credit of it*.

It is no good exception, that a witness has maintenance from the King, for every man may maintain his own witness; neither is it a good exception, that he received a reward for having made a discovery of the crime to be proved against the prisoner; nor that a witness hath the promise of a pardon, or reward, on condition of giving his evidence; unless such reward be promised by way of contract, for giving such and such particular evidence, or full evidence, or any way bias him, to go beyond the truth.

It is allowed to be a good exception, that a witness believes neither the Old, or New Testament to be the word of God†, since it is on the gospel that our laws require the oath should be administered. Yet a Mahometan, sworn upon the 'Koran, has been admitted as an evidence‡: for if a murder, or other crime, is committed in the presence of a Turk only, the criminal is not to go unpunished because such an oath must not be taken; but the credit of the testimony rests with a jury.

* Hale's H. P. C. 280.

† Trials per pais, v. 2. f. 334. 693: 2 Keble's Rep. 314. pl. 23.

‡ Hale's Hist. P. Cor. 279.

All Protestant Christians make oath on the Holy Evangelists, except Quakers, whose affirmation is permitted to be taken instead of an oath. Roman Catholics, in general, are sworn in the same manner as other christian evidence ; yet as it is a custom among them to be sworn on a crucifix, or sign of the cross, it has been (in some courts martial, where I have been Judge Advocate) so administered to them, by the approbation and direction of the court, laying their right hand on a Testament, on which a large sign of the cross was made : this was done, in order to prevent any mental reservation, and press their testimony home to them, in point of conscience. No doubt exists in my mind, but that the Jew, who takes his oath on the Old Testament, or the Mahometan, who swears by the Alcoran, or the Roman Catholic, on the crucifix,—are in the same manner subject to the pains and penalties inflicted by the 17th section of the act of the 22d George IIId, for prevarication, perjury, or subornation of perjury ; such also is the Quaker, for a false affirmation ; and indeed any other person, under naval jurisdiction, the veracity of whose evidence can justly be questioned. Were the fact otherwise, the bonds of moral confidence

must in some instances be inevitably destroyed.

The punishment inflicted on seamen for prevarication before a court martial, is inserted in the minutes, and usually subjoined to the sentence, in the following terms :

“ And it appearing to the court that A. B. and J. C. two seamen belonging to his Majesty's ship——, who were produced as witnesses, and sworn and examined on the said trial, did, in the course of their several examinations, prevaricate in their evidence ; the court doth order them severally, the said A. B. and J. C. to be imprisoned in the Marshalsea for the term of three months.”

As to whether an accomplice in the crime charged against the prisoner, may be a witness for, or against him ? It has been long settled *, that it is no exception to a witness that he hath confessed himself guilty of the same crime, if he hath not been indicted † for it ; for if no accomplices were to be admitted as witnesses, it would frequently be impossible to find evidence to convict the greatest offenders. However, it has been

* State Trials, v. 1. f. 253.

† Idem, f. 723.

over-ruled *, that accomplices, who are indicted, are good witnesses for the King, until they are convicted.

It hath also been adjudged †, that such of the defendants in an information, against whom no evidence is given, may be witnesses for others; and that where ‡ A. B. and C. are sued in their several actions, on the statute, for a supposed perjury in their evidence concerning the same thing, they may, nevertheless, be good witnesses in such action for another.

Want of discretion § forms a good exception to a witness; on which account alone, exception may be taken to an infant ||. Yet in some cases, an infant of *nine* years of age has been allowed to give evidence; nay, in cases of rapes, charged to be committed upon infants, those of a much earlier age are allowed to be heard without oath, to give the court information, though *that* is not sufficient to convict the offender, without concurrent circumstances to corroborate it, proved by other witnesses ¶. It is no ob-

* State Trials, v. 1. f. 966. 3 Keble's Rep. 136. Pl. 70.

† Syderfin's Rep. 237. pl. 4.

‡ Roll's Abridgement, 685. pl. 3.

§ Coke upon Littleton, 6.

|| Hale's P. C. 263.

¶ Hale's P. C. 634.

jection to a witness, that he is an alien, or villain, or bondsman, &c. * ; yet in our colonies, a black man, being a slave, cannot give his testimony on oath in a court of justice.

Some are disabled from being witnesses, in consequence of a defect of intellects ; a person of *non-sane* memory cannot be a witness, while he is under that insanity : if he has *lucida intervalla* (lucid intervals), then, during the time he hath understanding, he may be a witness ; but it is with difficulty to be ascertained, what is the *minimum quod sic* †—the degree of incapacity invalidating such testimony.

No counsel, attorney, or other person instructed in the secrets of the cause by the party himself, can be compelled (or perhaps allowed) to give evidence of such conversation, or matters of privacy, as came to his knowledge by virtue of such trust or confidence ‡ ; but not only an attorney general, but any other counsel, or attorney, and consequently the Judge Advocate at a naval court martial, may be examined as a wit-

* State Trials, v. 1. f. 253.

† Hale's H. P. C. 278.

‡ Law of Nisi Prius, 267. Blackstone's Com. v. 3. p. 370.

ness, for either party, as to mere matters of fact * : and an Attorney General, or Judge Advocate, may be compelled to give evidence in favour of a criminal, though under prosecution by himself, should he be called upon by such criminal. And as the Judge Advocate, besides being prosecutor on the part of the crown, is also clerk or register of the court, he may also be called upon to produce the records, or proceedings of a former court, and to prove, upon oath, the authenticity of such records or proceedings. In all cases, where a Judge Advocate is called upon as a witness, the oath as such may be administered to him by the president of the court ; and, after giving his testimony, he is to re-assume the functions of his office. Lastly, among those who are allowed by law to be good witnesses, it is necessary to mention the judges and jurors ; but as inconveniences, or doubts at least, may arise, respecting members of a court martial, who act in the capacity of judge and juror, being called upon to give evidence—all officers attending as witnesses, are excluded from sitting as members on

* Law of Nisi Prius, 267. Blackstone's Com. v. 3. p. 370.

courts martial, although their priority of rank entitle them to a seat. Should it happen, that some material cause, unknown at the time they were sworn as members, renders their testimony of great import and consequence, they should, as was before remarked, decline sitting any more as judges on that trial.

In what manner witnesses are to give evidence.—The oath administered to a witness states not only that what he deposes shall be true, but that he shall depose the *whole truth*; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not *. Witnesses therefore, in rendering their testimony, must relate the very fact that the prisoner did, or the very words that he uttered; for it is no evidence, in any criminal case, that the defendant did so and so, or an account to the like purport: the court must know the very act, or words, to determine of their force and effect †.

No witness is allowed to read any evidence he may have prepared in writing; but he may recur to notes, to assist his memory.

Before the reign of Queen Anne, it had

* Blackstone's Com. vol. iii. p. 372.

† Hobart's Reports, 294.

been a constant and immemorial* practice not to suffer witnesses to be sworn against the King, on trials for capital crimes, except in some cases specially provided for by statute: though witnesses for the King, were in all cases sworn. However, this difference was set aside by an act of the 1st of Anne 9, pl. 3, which enacts that—"after the 12th of February, 1702, every person who shall be produced, or appear as a witness on the behalf of the prisoner, before he or she be admitted to depose or give any manner of evidence, shall first take an oath to depose the truth, the *whole* truth, and nothing but the truth, in such manner as the witness for the Queen is by law obliged to do; and if convicted of any wilful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities, which by any of the laws, and statutes of this realm are, or may be inflicted upon persons convicted of wilful and corrupt perjury." And an oath is administered to *every* witness at a naval court martial, except to any officers who, at the desire of the prisoner, are called upon to speak as to his general character and conduct.

* State Trials, vol. i. f. 55. 148; vol. ii. f. 296. 737. and Hale's Pl. C. 264.

If a witness produced and sworn for the King, alledge any matter for the prisoner's advantage, (as many times occurs,) this stands as a testimony, upon oath, for *the prisoner*, as well as for the King *.

A peer, sitting in judgment in the house of lords, gives not his verdict upon oath, like an ordinary juryman, but *upon his honour* †; when, however, he is examined as a witness, either in civil or criminal cases, he must be sworn. The respect which the law shews to the honour of a peer, does not extend so far as to overturn a settled maxim, that—*in judicis non creditur, nisi juratis* ‡; therefore at all courts martial he must deliver his evidence upon oath.

All witnesses, either for the King or the Prisoner, must be sworn and give evidence in presence of the whole court; each party having liberty to except to its competency, which exceptions are to be publicly stated, and openly and publicly allowed or disallowed by the court. This open examination of witnesses is much more conducive to the clearing up of truth §, than a private one; for a witness may frequently depose in pri-

* Hale's Hist. Placet Cor. 283.

† Salkeld's Rep. 512.

‡ Cro. Car. 64.

§ Hale's Hist. of the Common Law, 254.

vate, that which he will be ashamed to testify before a public and solemn tribunal ; besides, by this method of examination, all those who are to decide upon the evidence, have an opportunity of observing the quality, age, education, understanding, behaviour, and inclination of the witness,—points in which all persons appear alike, when the depositions are reduced to writing ; and yet, as much may frequently be collected from the manner in which the evidence is delivered, as from the matter of it *.

Major Adye, in his excellent treatise on army general courts martial, mentions an instance of the necessity of the whole court being present when evidence is given ; which may apply to navy courts martial, since passing the act of 19 George III. by which the members of a court martial are permitted to separate and go on shore whilst a trial is pending, previous to sentence being pronounced. He says, “ That on a late general court martial two material witnesses were sick, and unable to attend the court, in order to give their evidence ; six of the members were deputed to take it at their own apartments, and report it to the court ; for which

* Blackstone's Com. vol. iii. p. 373.

irregularity his Majesty thought proper to disapprove of their proceedings: however, if material witnesses, either for the King or prisoner, are unable to attend, through sickness, or other satisfactory causes, the *whole* court may adjourn to the sick (or other) persons' houses, and there receive their evidence, the prisoner being present, and having an opportunity to cross-examine them."

In the examination of the witnesses, those in support of the charge are first to give their testimony, which they do by being in *court singly*; and before they withdraw, the court asks the prisoner if he has any questions to put. Evidence in support of the charge being gone through, the prisoner is heard in his defence; he is at liberty to produce what witnesses he can, to confirm, on oath, what he himself advances. The members of the court, *the Judge Advocate*, or prosecutor, and the prisoner, have equally a right to question and cross-question the several witnesses, whether produced on one side, or the other: and although it is the usage at all naval courts martial, not to permit any witness to remain in court, but the one who is giving his evidence, yet it may sometimes become necessary to confront adverse witnesses, who diametrically and absolutely contradict one

another, in their relation of the same fact, or facts.

The evidence on both sides being heard, and the prisoner having made his defence, the prosecutor has a claim, in case he finds it necessary, to make a reply *. By a reply is to be understood, a right of observing upon the evidence in general, which cannot be done till it has been heard on both sides; and also a right of controverting, by evidence, any new matter introduced by the prisoner in his defence. Courts martial being directed by the same principles of justice and humanity that influence other jurisdictions, and obliged to pay attention to what is the universal and known practice in all other courts of law in the kingdom, (except in instances wherein they differ, agreeable to regulations and restrictions established by the statute law, or the usage of courts maritime;) it cannot, I think, be deemed an indulgence to a prisoner, to be permitted, on application, to give in his answer to the prosecutor's reply; which is termed a rejoinder. Notwithstanding, such a liberty is considered rather a matter of special favour than of

* Vide Admiral Sir Hugh Palliser's speech in a Committee of the House of Commons, 4th December, 1780, Page 13, 14, 15, 16.

right, and seldom practised in the navy; for the prisoner has already had his opportunity of stating the evidence on both sides, and can have no new matter to controvert, because the prosecutor is not at liberty to produce any in his reply.

It is impossible to limit the number of witnesses it may be requisite to summon on courts martial; particularly when the trial is on an officer of eminent rank, for a supposed defect in conducting a large fleet into, or during an action with the enemy, &c.: as several officers may give evidence to detached parts of the action, as to time and place. To investigate the cause impartially, all the witnesses whose names are given in, either on the part of the prosecution, or in behalf of the prisoner, should all be summoned, if they are to be obtained. I shall here subjoin the opinions of the Attorney and Solicitor General, on being applied to by the Admiralty, for their opinion, if a court martial should not refuse some witnesses, whose depositions went to corroborate what other witnesses might relate to the same purport? This was after the trial of the captains in the fleet under Admirals Matthews and Lestock in the Mediterranean, for their conduct in an action with the com-

bined fleets of France and Spain; and shortly before the trial of those flag officers commenced: for Admiral Lestock's court martial assembled on the 6th of May, 1746, and Admiral Matthews's on the 16th of June, 1746.

COPY OF THE OPINION

Of the Attorney and Solicitor General, respecting the Number of Witnesses to be examined on a Court Martial.

“ IN answer to the questions in the within letter, we think the court should not refuse any witnesses that are now ready to be examined, if the prosecutors insist they are material; but we are of opinion, it is in the power of the court to limit and ascertain a time of concluding the examination: what time that should be, must depend upon all circumstances, of which the court only can be judge; but we think the prosecutors should be very careful, not to call too many to the same parts, which can only tend unnecessarily to protract the trials, and finally to conclude the justice of them.

D. RYDER.

W. MURRAY *.

H. LEGGE.”

* The late Earl Mansfield.

Officers are often called by a prisoner, when on his defence, to give evidence in respect to his general character and conduct, particularly if the defendant has served under them; but the officers so called upon are not (by the usage of naval courts martial) under the necessity to give such evidence on oath, because it does not relate to the charge against the prisoner, and can only have effect in respect to mitigation of the punishment he might be liable to have inflicted on him.

Witnesses on courts martial are not so liable, from the nice honour and delicacy of feeling in officers, to be subject to that overbearing and brow-beating conduct, which is too frequently practised by the gentlemen of the long robe, in their official capacity; and which not unfrequently demands the interference of the judge on the bench, when (as I am led to lament) it is carried beyond the bounds of decency and decorum.

Indeed an officer on any court martial, could he permit himself to be hurried to such extremes, has not that plea of extenuation which a barrister might adopt—"that he was bound to do the best for his client, whom it was his duty *to support in a certain degree*, in return for the fee he had received with his brief."

While sitting on a court martial, an officer being not only judge and juror, but counsel, in respect to the examination and cross-questioning of the evidence, (and if a president, considered as counsel for the prisoner—to check any improper questions his ignorance of law might lead him to request, to be put to a witness, tending to his own crimination); officers in such situations feel so deeply the great trust and confidence reposed in them by the legislature, as to have no interest or advantage in the decision of the trial, but what arises from their regard to justice, propriety, and the good of the nation, in support of due discipline and subordination in his Majesty's naval service. That eloquence, therefore, which is elsewhere too effectually employed, and which more frequently misleads than informs, is of little or no avail in the proceedings of courts martial. Here, if any where, all is mind without passion, and justice without asperity.

Before I terminate this chapter, it may not be irrelevant to offer some remarks on the evidence of women.

No ordinance expressly excludes the evidence of women on naval courts martial; because, by the existing regulations of the

service, they are not allowed to be received on board ships going to sea, without particular orders from the Admiralty, or commanding officer at the port, or foreign station: nay, even whilst the ships are in harbour, it is only from the absolute necessity of granting seamen an indulgence, that custom has rendered the introduction of women on board a ship necessary to be connived at. Therefore, from the experimental knowledge of officers in actual service, contrary regulations have been deemed a dead letter; and, under that impression, they have (more particularly of late years) been in the habit of permitting women, especially sailors' wives, to go to sea in their respective ships. It must be acknowledged, these have been found very useful in administering to the relief and assistance of sick and wounded men: and they have even been allowed prize money.

Although it may be natural for a court martial to reject the evidence of women, on charges of a military nature, where they cannot give competent evidence, or in any offences of a different complexion, where a man can establish the fact, yet it may so happen, in cases of mutinous confederacy, riots, or disturbances, blows given, and even

murder, (within the naval jurisdiction,) that the fact can be established by a woman's evidence only; especially in hospital ships, where women form a part of the establishment, as nurses and washer-women.

It therefore becomes essentially necessary for a court martial to be informed how far they can or cannot reject the evidence of women, under such circumstances, without compromising the ends of public justice.

When several persons are implicated in the same offence, they are generally tried together, by a naval court martial, and sentence pronounced upon them collectively, at the close of the trial. Such was the practice in the case of the mutineers of the *Bounty*, Captain Bligh, who were tried on board the *Duke*, in Portsmouth Harbour, in September, 1792. On that trial, it appeared that one of the prisoners, Charles Norman, had no evidence brought against him which tended to criminate him. Captain Bligh, in the charge he exhibited against all those who remained in the *Bounty* after the ship was taken from him by the mutineers, had particularly mentioned that Norman was detained on board by force, and against his will; from which circumstance it was natural to infer he would be, as he

afterwards was, acquitted of the charge, in common with the rest of the mutineers who remained on board the *Bounty*.

This induced William Muspratt, one of the prisoners, (after the evidence in support of the prosecution was closed,) to move that the court would decide on Norman's fate, by passing sentence previous to his entering on his defence; that, if acquitted, Muspratt might avail himself of his evidence, which he believed would be favourable to him. The court was cleared on the motion; and when re-opened, the Judge Advocate read their opinion—"That the prisoner's request could not be complied with, as it militated against, and was contrary to the practice and usage of, naval courts martial."

Muspratt made his defence in the best manner he was able; lamenting the decision of the court, which deprived him of a material evidence in his favour. He and six others were condemned to death, of whom two were recommended to mercy; but nothing was stated in favour of Muspratt. He having some friends, who made application in his behalf, by their influence the execution of his sentence was respited till the opinion of the twelve judges could be obtained on the question,—“Whether,

under the circumstances of the case, judgment should not have been first passed on Norman?" The judges' opinion being reported to the Admiralty, "That Norman's evidence should have been received," Muspratt was fully pardoned.

In future trials of a similar nature, men who are implicated in the same charge for the same offence, should either be tried separately, or sentence pronounced individually on those who appear likely to be acquitted before the rest of the prisoners enter on their defence, that these may avail themselves of the testimony of their acquitted comrades. Not often can it happen, that a seaman has friends powerful enough to obtain a decision on a question of law, in which life is involved. Had the court martial on the mutineers of the *Bounty* been convened on a foreign station, the sentence on Muspratt would in all probability have been carried into execution, without his request ever having been brought to the test.

A report prevailed, and was credited by most of the naval officers present from the beginning till the close of Captain Molloy's trial in May, 1795, that witnesses would be brought into court, who had not been examined before, either in behalf of the pro-

secution or prisoner ; in order to establish or explain certain circumstances that might lead the court to form a more decided opinion on the charges brought against the prisoner, than what had been collected from the evidence adduced ; and that these witnesses would be summoned, by direction of the court.

Now, it is presumed that a court martial (acting both as judge and jury) cannot exceed the limits prescribed to those who fill similar situations in courts of common law ; where the witnesses in support of the prosecution, if of a public nature, (as in all courts martial,) are subpoenaed by direction of the Attorney General, or King's Solicitor ; and those in behalf of the prisoner, by the counsel, or such persons as are employed in his defence. Neither the jury, who are bound to give their verdict according to the evidence exhibited in court on either side of the cause ; or the judges, who must pass sentence according to law, in consequence of the jury's verdict, have a power (from any circumstances relative to the cause to be tried, that might come within their own knowledge in the capacity of private individuals) to direct any person to be summoned to give evidence, who has not been

regularly subpoenaed either on the part of the prosecution or the defendant; but they must be guided in their decision by the evidence regularly brought into court by both parties: unless, indeed, either party request any particular person may be called before the prosecution or defence is closed, whose names were not given in order to be summoned previous to the commencement of the trial, and who are at hand on the spot, ready to be immediately examined without adjourning the court.

If it is admitted that such an extensive prerogative does not exist in our courts of common law, how can it reside in the members of a court martial? it may therefore be concluded, that had it been attempted, *or expected*, in the case of Captain Molloy, objections would have been urged by the prisoner, and it would have become a serious point of law.

Suppose a witness, summoned on the part of the prosecution by the Judge Advocate, some time previous to the court's assembling, but who could not reach the port where the court martial was held, till the prosecution was closed, and the prisoner was upon his defence,—it would reasonably be expected, even if no objection was taken to such an

evidence by the prisoner, that the impartiality of the court would induce them to forbid his being examined.

No doubt the prisoner has a right, when on his defence, to call upon any of the witnesses in favour of the prosecution, to cross-examine them, in order to invalidate their evidence, notwithstanding that he may have asked them several questions when they were examined in support of the charge: but he should always recollect, that if once he brings them *again* into court, both the prosecutor and the members of the court martial have a right to examine them also; by which means many circumstances may be brought to light that were not known before the prosecution closed, and which, perhaps, tend to criminate instead of exculpating the prisoner.

Whether, or not, these motives induced Captain Molloy to decline bringing into court, upon his defence, several of the witnesses for the prosecution, whom he had requested should be detained, as he intended to cross-examine them, I cannot tell; but it is certain he relinquished his intentions of so doing. In the case of the boatswain of the *Cæsar*, whose evidence was not per-

mitted to be given on the part of the prosecution, because he had been in court a very short time when some of the witnesses were examined, Captain Molloy much lamented the court's determination of not receiving his evidence, as (he said) he looked upon him as a most material witness in his favour; in consequence of which, the court afterwards came to a resolution to permit Captain Molloy to call the boatswain as an evidence on his defence: of this permission, however, he did not avail himself.

In all courts of common law, whenever witnesses are subpœned to attend in a criminal cause, at the suit of the crown, if their residence is at any distance, travelling expences are defrayed, either by the county or government; besides allowance made for expences attending any detention that may arise, in attendance on the court, should the trial be postponed beyond the day specified.

In a naval court martial, not only the day on which it is to assemble is uncertain, but also the length of its duration, varying, according to circumstances, from one day to perhaps three weeks. Officers may be summoned in behalf of the prosecution, who are

on half-pay, and residing at a considerable distance, perhaps at the extremities of Scotland or Ireland; and if on whole-pay, who are employed on board ships at a great distance from the port at which the court martial is to be held, and obliged, for dispatch, to travel by land. It might appear a just inference, under these circumstances, that it was laid down as a general rule, by the Admiralty Board, that all officers so summoned by the Judge Advocate or his deputy, should have their expences defrayed, till their return to their places of residence, or joining the ships to which they belonged.

However equitable the inference, nothing could be more erroneous than such a supposition. Generally, officers have never been reimbursed their expences on such occasions, though remuneration was repeatedly solicited; the more fortunate few who have succeeded in their applications on the subject, being indebted for their success to some peculiar circumstances, which induced the Admiralty to order the treasurer of the navy to honour the demand. Every individual witness must importune their Lordships for the repayment of his expences, who, after

all, are fully at liberty either to refuse or comply with the request.

It becomes therefore a subject for enquiry, how far an officer is *legally* compellable to attend the summons of a court martial, when he has so little prospect of obtaining the repayment of the expences he must incur. Nor is this the only consideration by which an officer might in such circumstances be influenced: his finances might not empower him to advance money for a long journey, even were his disbursements certainly refunded. When subpoenaed on the part of the defendant, he may indeed demur, till assured that his costs will be repaid; but this is a dilemma in which a man of honour, and of any ability to undergo the charge, never can hesitate to comply; especially if his evidence tended to exculpate an officer, who nevertheless was unable to reimburse his expences. Since, however, this excuse cannot apply to the prosecutor, who carries on the prosecution at the suit of the crown, it appears but equitable that the expences incurred by witnesses in support of the prosecution, in naval courts martial, should be fully reimbursed, in a manner as fixed and certain as in the courts of common law. Both

jurisdictions exist for the general benefit of the country; and, in this point of view, demand equally to be invested with those advantages which essentially contribute to the efficiency of judicial institutions.

CHAPTER XII.

OF AN EQUALITY OF VOICES, ON MATTERS
RELATIVE TO TRIALS BY COURTS MAR-
TIAL.

THE seventh article of the naval general printed instructions, under the head of courts martial, declares that, all matters relative to the trial being fully considered and debated on by the court, the votes are to be collected, beginning with the junior member, and proceeding to the president; and the determination of the court, settled according to the majority of voices. This is the only authority for the customary mode of procedure, in order to give a verdict or judgment at naval courts martial: for the act of 22d George II. for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea, is intirely silent on the subject. As the greater number *thirteen*, and the smaller number *five*, of the members who can compose a court, are odd numbers, it appears to

have been thus enacted, in order to give the president the casting vote ; and yet it can only be deemed to be *so implied*: for there is no direct or positive clause, in the said act, which specifies that when the number of officers, who are assembled to hold a court martial, make an *even number*, the junior should be excluded, or the trial deferred, till the arrival of another ship, whose commander may make up an odd number. Now, all decisions of courts martial being determined by a majority of voices, should the members, when an *even number* compose a court, be *equally divided* in their opinions, how is judgment to be given, and sentence pronounced ?

Where there is no voice to turn the scale, the accused should be acquitted of the charge, if the number of his judges are equal in opinion to *acquit* or *condemn*. Since it requires a majority of voices to condemn, an equality should of course acquit ; as it neutralizes the opinion of the judges, who can come to no decision.

Can it be inserted in the sentence of a court martial, that the prisoner is *acquitted* because the votes and opinions of the members were equal to condemn, or acquit ? This question has been negatived ; alledging,

that such a minute would be contrary to the oath whereby the members are enjoined not to discover the vote or opinion of any individual member of a court martial, unless required by act of parliament. May not this, notwithstanding, be deemed a strained construction? Such a clause, specifying only that *half* the court was of that opinion, no more particularizes the vote or opinion of any individual member, than the word *unanimous*, (so frequently used, in drawing out the sentences of naval courts martial,) which has been held by many to be an encroachment on the letter of the oath, as by disclosing the opinion of the whole court, it likewise discovers the vote of every individual member. But it certainly cannot infringe on the spirit of the oath, which is calculated to prevent exceptions and disputes, arising from the knowledge of the opinion and vote of any particular member, which, being divulged to the public at large, might occasion rancour and broils, and subject him to insult, or quarrels, from the person who was tried. If in this case exceptions are taken to the members, it must be to the whole court, and not to any separate member, as the partiality or hardship of the judgment (if any is supposed) must be attributed to the

whole ; and it is as impossible to select any individual, when the word *unanimous* is inserted, as when it is stated in the sentence, that the court is of opinion, &c. &c.

To prevent, in *some measure*, the difficulty that occurs from what has been mentioned respecting an equality of voices, the president might be duly and legally authorized, if he gave his vote or opinion in favour of the prisoner, to have the effect and force of *two voices*, but only of one, if against him. A regulation of this kind is mentioned by Monsieur de Bardet de Villeneuve, (in his *Cours de la Science Militaire*, tom. i. p. 64.) as a custom adopted in the French service. Great benefit might therefore accrue, if, in addition to the oath of not disclosing the vote or opinion of any particular member of a court martial, the collecting of the votes, by the Judge Advocate, was not only regulated, as by the present act, but each member directed to write his vote or opinion on a piece of paper, signed with his own name, and deliver the same sealed to the Judge Advocate ; who when he had in that manner collected all the voices, should open the papers, and report according to the majority of votes. No practice would be more likely to prevent the degree of

prejudice or influence, that may affect the minds of the other members of the court, by the knowledge of the particular vote or opinion of each respective officer, when delivered in the presence and hearing of each other; it being hereby ascertained before it comes to the vote of the senior officer, and president, on which side the majority is likely to preponderate.

The decision or result of a court martial, when the votes are equal, which may frequently happen, is a very serious and material consideration. It is astonishing that the act of parliament has not directed what is to be determined, should such a circumstance occur. I believe the dilemma would stagger a court martial. Since, therefore, no authority given by the act of parliament allows the president two voices in any case whatever, I shall insert the opinion of Dr. Paul on this subject; which, though written previous to forming the act now in force, is not on that account inapplicable to the the present time.

A COPY OF THE OPINION

*Of Dr. Paul, upon a Debate arising at a Court Martial,
when an equal Number of Votes were on each Side.*

To the Right Honourable the Lords Commissioners for
executing the Office of Lord High Admiral of Great
Britain, &c.

“ IN humble obedience to your Lordships’ commands, signified to me by Mr. Winnington your Lordships’ solicitor, referring to me a letter from Mr. Atkins, deputy Judge Advocate to the fleet, setting forth that upon a debate, a certain matter was put to the vote at a court martial, upon which there appeared to be an equal number, the president included; viz.—*six* against *six*; and upon which a motion was made, and agreed to, that since an equality of votes may happen in some material causes, therefore that a letter should be wrote to your Lordships for your opinions what is proper to be done, when a matter is put to the vote, and the numbers are equal on both sides, the president included; and how that matter is to be determined; directing me to lay before your Lordships my humble sentiments upon this case :

“ I with great submission certify your Lordships, that by the laws of this realm, when there are a number of judges appointed to adjudge or determine a point of law, or fact, the same must be settled and decreed by a majority. In the *King's Bench, Common Pleas, and the Exchequer Courts*, there are in each *Four Judges*; the chief is vested with a superior dignity, not much unlike a president; but in division, if two *Puisne Judges* dissent from the chief and one puisne judge, no judgment can in such case be given. In the court of Delegates, where the Lord High Chancellor appoints a number of Judges, if at any time upon an ordinary act, or sentence, the court happens to be divided, no order or sentence can be obtained, though there is always a person of a superior distinction placed at the head of every such commission of delegates.

“ I therefore conceive that a court martial should observe the same reasonable rules that other courts of justice comply with; the point at issue may be reconsidered by the same judges, and if they shall alter their opinions, that may induce a final determination of the point in question; but if the several members of the court martial

adhere to their first opinion, upon which there is an equality, I think the question must remain undecided.

(Signed)

G. PAUL *.”

Doctors Commons,
28th June, 1746.

Trial by a jury of twelve men is of very antient date; but the obligation to be unanimous in their verdict, which is required in criminal cases by the common law of England, is not of equal antiquity. Where verdicts are governed by a majority of voices, it is proved the most antient usage—that an *equality of votes acquits a prisoner*.

We find † that Orestes, who was tried for murder in the court of Areopagus, at Athens, was acquitted, by the suffrages for and against him being equal; in which case, judgment always passed in favour of the defendant.

This court was called Areopagus, because it assembled on a hill not far from the citadel called *Arious Pagos*, or Mars's Hill; Mars having been the first criminal, as some authors assert, who was tried in this court.

* The intelligent reader must determine, how far a court martial is enlightened by this opinion.

† Stanyan's Grecian History, vol. ii. p. 56.

Their fame was so great, that foreign nations resorted hither for judgment; and Demosthenes says, that neither plaintiff or defendant ever went away dissatisfied. They decided all causes in the dark, seeing neither plaintiff or defendant, in order that their passions might be un-influenced*.

Among the Romans (who are supposed to have borrowed the number twelve from the Grecians) the custom was, when the prætor sent out the jury to consult—*mittebat judices in consilium*—he delivered to every one three tablets, covered with wax; one of *absolution*, another of *condemnation*, and a third of *ampliation* or adjournment of the trial; the first being marked with A. the second with C. and the third with NL. or *non-liquit*; these tablets being thrown into the proper number of urns, or boxes, which were set in the place where the jury withdrew, and taken out by the prætor, he pronounced sentence according to the greatest number. In awarding sentence, a majority of the judges were required in criminating the defendant; and if the numbers were equally divided, the defendant was actually cleared†.

* Universal History, b. i. c. 16. p. 309. 330. 413.

† Kennet's Antiquities of Rome, p. 130. 147.

In the *Nembda*, or jury of the antient Goths, there was required (even in criminal cases) only the consent of the major part; and in cases of an equality, the defendant was held to be acquitted*.

These details are enumerated, to shew the force of the position, that an equality of voices, in favour of the prisoner, should amount to an acquittal. But in this, as in many other particulars, there is required a plain declaratory law, to direct and govern the decisions of courts martial.

* Barrington on the Statutes, 17, 18, 19. Steenhook, l. i. ch. 24. Blackstone's Com., b. iii. p. 376.

CHAPTER XIII.

OF GIVING A VERDICT, OR OPINION, AND
PASSING SENTENCE.

HAVING considered the evidence on both sides, and heard what the prisoner had to offer in his defence, and also a reply and rejoinder, (*if permitted*) the court come now to perform the most intricate part of their duty, in the discharge of that solemn and important trust—the office of both judge and jury. In determining on the guilt or innocence of a prisoner, frequently the most serious and delicate points are involved. Owing to a delicacy almost peculiar to the military character, reputation and life may depend on the judgment about to be denounced, and incurred, perhaps, by misconduct which might be attributed to the deficiency or error of human understanding only; or to casual events, though in their operation productive of great national misfortune.

Previous, therefore, to exercising this part of their functions, it is necessary that every member should be perfectly informed of the

matter in question; in order to obtain which information, it should be fully debated among themselves, while the Judge Advocate is employed to elucidate and explain whatever may be doubtful or intricate. Some points also, in regard to guilt in general, require materially to be considered, before a definitive opinion is given.

The guilt of offending against any known law, necessarily supposes wilful disobedience, and can never justly be imputed to those who are either incapable of understanding it, or conforming themselves to it; and therefore cannot apply to persons* under natural infirmity or disability of distinguishing good from evil: as infants under the age of discretion, idiots, and lunatics, who are not chargeable for their own acts, if committed under such incapacities. It is observed, by Sir Edward Coke, that the execution of an offender is for example—*ut pæna ad paucos, metus ad omnes perveniat*†: nay, further, if any one‡ who has committed a capital crime, become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed.

* Hawkins's Pl. of the Crown, b. i. c. 1.

† 3 Institute, 6.

‡ Hale's Pl. of the Crown, 10. 43. 65. 3 Inst. 4. 6.

On the other hand, he who is guilty of any crime, through voluntary drunkenness*, shall be punished for it, as if he had been sober; drunkenness being rather an aggravation of, than an excuse for criminal behaviour. He, likewise, who incites a lunatic to the commission of a crime, is a principal offender†, and as much punishable as if he had done it himself.

One urged to do what his judgment disapproves, and what it is presumed his unfettered will would have rejected, may plead this in exculpation of himself: but this, very few cases excepted, (such as a rigorous confinement and imprisonment, or threats of corporal punishment, so as to endanger life,) can have no weight, so as to be a strong and assuasive plea, to soften the offence of doing that which the law forbids.

Ignorance of the municipal law of the kingdom, or of the punishments thereby inflicted on offenders, does not excuse any who are of the age of discretion, and *compos mentis*, from the penalty of the breach of it; because every person of the age of discretion, and *compos mentis*, is bound to know the

* Coke upon Littleton, 247.

† Hale's Pl. of the Crown, 43, 44. Dalton's Justice, ch. 45.

law, and presumed so to do*. Never, therefore, can it be an excuse for a prisoner, at a court martial, to plead ignorance of martial law; which is contained in so small a compass as one large sheet of paper, and hung up in the most public and conspicuous part of the ship, free to the access of every individual, who, if he cannot read himself, has the benefit of hearing it read at least once a month; a certificate of which practice, signed by the signing officers of the ship, is affixed at the end of every monthly muster-book.

In some cases, *ignorantia facti*, or ignorance of the fact, doth excuse; because such ignorance many times makes the fact itself morally involuntary. If the act committed be simply casual, and *per infortunium*, that act which, were it done *ex animi intentione*, becomes punishable with death, is not, by the law of England, to undergo that punishment; the will and intention being regularly required, as well as the act and event, to make the offence capital. For instance: it is known in war (says Sir Matthew Hale†) that it is the greatest offence for a soldier to kill, or so much as assault his general; suppose then, that the inferior officer sets his

* Hale's Hist. Pl. Cor. 42.

† Hale's Hist. Placit. Coronæ, 25.

watch or centinels, and the general, to try the vigilance or courage of his centinels, comes upon them in the night in the posture of an enemy (as some commanders have rashly done), if the centinel strikes, or shoots him, taking him to be an enemy, his ignorance of the person excuseth his offence. The post of centinel is sacred, and he is to receive his orders through the regular channel of his serjeant, or the corporal who places him there; and is not to be forced to act contrary thereto, by any superior officer, till such orders are properly cancelled and made void.

There is not a greater military offence, than that of officers confining their captain, and suspending him from the exercise of the authority he has over every person in the ship, subordinate to him; it being the height of sedition and mutiny. Yet there are instances, in which officers acting in this manner, have not only escaped the punishment due for so heinous a crime, but have in some degree merited praise; by pleading, in extenuation of their offence, the motives that induced them to commit what appeared, at first sight, to be one of the most flagrant breaches of military law. Captain Goodeare, who commanded a 20 gun ship, in Kingroad

near Bristol, had his brother brought on board the ship by force, and afterwards got two men, belonging to the ship, to murder him in the night, when in the purser's cabin in the cockpit. This was discovered to the first lieutenant, by the cooper, who lay in the steward room, and was awakened by the noise and struggles of the unfortunate gentleman, and who saw through the scuttle of the steward room, which looks into the purser's cabin, so as to enable him to swear to the persons who perpetrated the murder. On being secured accordingly, these immediately disclosed that the captain had suborned them to commit the atrocious act, by a great reward; in consequence of which, for fear of the captain's escaping justice, the first lieutenant confined him. For this offence against military subordination, he was tried; the charge was proved, and he was, by the sentence of the court martial, deprived of his commission. The reasons for his procedure appearing just and satisfactory to the court, he was at the same time recommended to the Admiralty, who, on their representation, immediately restored him. Captain Goodeare, as an accessory and accomplice, and the two men as principals, suffered the penalty of the law.

Another instance in point, occurs in the conduct of the officers of the Stag, who confined their captain, for committing a crime at which nature revolts. I subjoin a copy of the sentence of the court martial, as the best illustration on the subject.

At a court martial, held on board his Majesty's ship Vanguard, in Casvance Bay, Martinique, 4th of February, 1762.

PRESIDENT,

Robert Swanton, Esq. Commodore.

CAPTAINS,

John Barker.

Saml. Marshall.

Thos. Harkerson.

John Harvey.

George Derby.

Wm. M'Cleverly.

Being all duly sworn, pursuant to an order from George Bridges Rodney, Esq. rear-admiral of the blue, and commander-in-chief of his Majesty's ships and vessels employed at Barbadoes and the Leeward Islands, and seas adjacent, dated the 3d of February, 1762; proceeded to the trial of Lieutenant John Beazely, Jno. M'Leigh, master, J—M—, boatswain, J—D—, gunner, G—B—, carpenter, William Forster, lieutenant of marines, John Moser, purser, and William Spence, surgeon, all belonging to his Majesty's ship Stag; for taking the command

from, and confining their captain, Henry Angel, their then commander.

“ The order for trial being first read, as also the certificate signed by the aforesaid officers, for confining their said commander, and having heard what the prisoners had to say in their defence, and considered the whole, and every part thereof; the court is of opinion, that the charge is proved: but, as it appears the certificate was not signed in a mutinous manner, and that the officers met together in compliance with the request of their late first lieutenant for their opinions, the court does acquit *all* of them, of any design of mutiny thereby; and adjudge them to be severely reprimanded for their conduct: and they are therefore hereby sentenced to be severely reprimanded for their conduct by the president accordingly.”

Signed by all the Members.

Signed,

THOMAS FORLEY,

Deputy Judge Advocate.

The crimes which are cognizable before a court martial, may be divided into felonies and misdemeanours; or into capital offences, and offences criminal, but not in their nature capital: and if a prisoner, after going through

the evidence, does not appear to be guilty of a crime of so capital a nature as was set forth in the charge, yet the court may find him guilty in a less degree, though not of a quite different sort of crime or misdemeanour. A seaman tried for desertion, may be found only guilty of absenting himself without leave. The act and deed is in this case the same, but the intentions that accompany it, which must be judged of from circumstances, are what constitute the crime, and not the length of time, that he is absent, or the distance to which he escapes. For example, a man might quit a boat on shore, or leave his officer whilst on duty in the dock-yard, without an intention to desert; and on his return find the boat gone off, and the ship might sail immediately on a foreign voyage. The man might be taken ill, perhaps unable to deliver himself up to the commanding officer of the port, and probably ignorant it was necessary for him so to do, or the fear of punishment might prevent him from acting in any consistent manner. Were he afterwards found on board a merchant ship, or in a King's ship, to the captain of which he had not disclosed his former desertion, although a length of time, (not exceeding the prescribed limits) had elapsed since he de-

serted or absented himself, yet if favourable circumstances were proved, he might not be deemed so culpable, or be sentenced to so heavy a punishment as a man apprehended shortly after desertion, where occurrences strongly intimated a determined resolution and plan to desert from the ship.

Seamen are not run on the books of his Majesty's ships, till after they have been absent threemusters checqued without leave; and if taken up within that time, at a small distance from the ship, each is charged twenty shillings straggling money, which is paid to the person who brings him on board: in which case he does not forfeit his wages, but is liable to punishment by the captain. Although the crime of desertion is a most capital offence, punishable by death in the navy, as well as in the army, yet there are fewer instances in the navy, of its being inflicted for such offence. Probably this lenity is dictated by a consideration of the great hardship (indispensably necessary,) of manning our fleets by compulsion, and impressing men into the service. It should, however, be recollected, that all punishment is inflicted more as an example and warning, to deter others from the commission of crimes, than from any desire to

punish or take revenge on the party, for his offence. A few examples of severity, well timed, might in effect be a merciful act; prevent the frequent repetition of desertion; and the shame of being made a public spectacle, by punishment through the fleet. Every encouragement that government can give, by allowing bounties to seamen, is held out to induce them to enter voluntarily into the service; and in times of urgent necessity, most of the principal trading cities have given rewards, in addition to his Majesty's royal bounty. The latter, I am sorry to observe, has been but too often abused, and has rendered desertions more frequent; men having continually entered on board different ships, in order to obtain a renewal of bounty money, and expecting, by assuming fictitious names, to escape detection.

It were to be wished, that the amount of the bounty was given in necessary wearing apparel, instead of cash, which is too frequently encroached upon, by the credit that publicans at the sea ports afford to seamen, on the knowledge and expectation of their receiving their money before the ship proceeds to sea.

If a man is tried for desertion, and there should appear strong suspicion of his having

been guilty of mutiny, or any other distinct crime or offence, of which he was not accused; the court can only declare him guilty of the crime set forth in the charge. But if, in the course of the trial for one crime, there should be reason for concluding him guilty of another, which is not given in the charge to the court, though the prisoner be acquitted of the one he is then tried for, the court may order him into confinement, and he may be brought to a new trial for the crime of which he is suspected.

In a court of law it hath been adjudged *, that if a jury on an indictment, or appeal of murder, find the defendant guilty of manslaughter, without saying expressly as to the crime of murder, it is insufficient and void, as only a verdict for part.

By the 28th naval article of war, the punishment for murder is death, without mitigation; therefore a court martial have it not in their power, from circumstances, to bring it in manslaughter, but must either condemn, or acquit the prisoner of the charge. What Sir James Marriot said to the gentlemen of the grand jury for the city of London, at a session court of Admiralty held on

* Hawkins's Pl. of the Crown, b. 2. c. 47. f. 5.

the 7th of June, 1792, is applicable to courts martial.

“ That if upon examination and evidence against a prisoner, certain circumstances should appear which in the eye of the law at land, would make it man-slaughter, or a matter having the benefit of clergy, no distinction of that kind can be taken at a court of Admiralty, such as we now sit in ; but the party, if not found guilty of *murder* upon the high seas, *must be acquitted*; thus it is, that in a court of Admiralty, whatever distinctions and differences have been taken in other courts of the realm, the jury will, and must judge of the whole criminality.

“ Criminality is a mixed mode, as it is called by the metaphysicians, or a complex of ideas necessarily including the idea of the law ; which law makes the fact done, to be what it is in legal interpretation. The verdict of criminal, or guilty, includes the fact done, together with the manner, the intention, and the law which makes it be, what it is found and adjudged to be, both in essence and denomination.”

By the 30th naval article of war, “ all robberies committed by any person in the Fleet, shall be punished with death, or *otherwise*, &c. &c.” yet *that* word does not con-

vey, or give any authority to a court martial (notwithstanding such crime should be committed on the high seas, or other places within Admiralty jurisdiction) to change the punishment to that of banishment, or transportation to places beyond the seas.

It is customary at courts martial, as in courts of law, to allow offenders, in criminal cases, to bring in persons of credit to give their testimony to the accused person's good behaviour, integrity of life, and to his character in general. This is an antient custom, practised even by the Romans. The testimony of these witnesses may be of the greatest service in some cases ; and be the means of the punishment being mitigated : even if the crime is so far proved, particularly in cases of murder, that it admits of no mitigation, and the court are necessitated to find a prisoner guilty, it may yet induce them to recommend him to mercy.

When the members are ready to give their opinion, the Judge Advocate is to put to every one, separately, this question—“ From the evidence given for, or against the prisoner, and from what he has offered in his defence, are you of opinion, that he is guilty, or not guilty of the crime or crimes laid to his charge ? ” If the majority find him not guilty,

he is accordingly acquitted ; but if it appears, upon casting up the votes, that the majority declare him guilty, then those who have found him so (for it is absurd to suppose, that such as have found not guilty, would assign a punishment) are to pass sentence or judgment upon him : which judgment those in the minority must sign, notwithstanding their difference of opinion. Laws would be of little avail, did not the infringement of them subject offenders to pains and penalties.

After a majority have found him guilty, the next question is—" Under what article of war does the prisoner's offence fall ?"— " Is the offence capital ?"—if not so, " what is the quantum, nature, or degree of punishment, &c. to be inflicted ?"

Pains and penalties are various, according to the nature of the offence, or the mischief and detriment that thereby ensues to society. Some are corporal, but not capital ; such as imprisonment, flagellation, &c. Others are capital, *ultimum supplicium*, or death.

The articles of war, in a few cases, point out the express sentence to be passed on criminals, without any alternative ; in some, an optional power is given, of punishing with

death or otherwise ; and in others, offenders are punished at the discretion of a court martial, omitting the word *death*, which evidently means the exclusion of the power of punishing capitally.

Capital punishments inflicted by martial law, as the mode is not particularly specified in the naval articles of war, differ (agreeable to the practice and usage of the navy) according to the rank of the person who unfortunately is sentenced to death. An officer of eminent rank, is in the navy sentenced to be shot ; but an inferior officer, or seaman, is hung by the neck at the yard arm : whereas in the army, a soldier is always shot for a military offence, as a punishment less ignominious, and more befitting a man who is continually exposing his life for the defence of his country.

Considerable distinction should obtain in the mode of inflicting punishments of an inferior kind, on officers and seamen: what may be regarded as a slight penalty inflicted on the one, would be considered as of great magnitude to the other. Habits and education, create essential differences in the minds and manners of men. To dismiss an officer from his Majesty's service, would be esteemed a heavy punishment; whereas a

common sailor would look upon it, in many cases, as a favour conferred upon him. Corporal punishment, which seldom operates on the feelings of a common seaman or soldier, must affect a petty officer (such as a midshipman, &c.) so sensibly, if he has the sentiments of a gentleman, as to render his future life a burden to him.

As to crimes whereof officers and seamen may be guilty, that are not of so capital a nature as to deserve *death*, cashiering is prescribed for the former, and corporal punishment for the latter; and for misdemeanours of a nature still more inferior, imprisonment in the Marshalsea for a stated time, not exceeding two years: in some cases, fines, or mulcts of the pay (or part of it) due, or becoming due to officers, is awarded. Custom has introduced suspension for a time, and public reprimands, for officers; which must have great influence on sensible minds. Other slight punishments are established for seamen.

Such are the different punishments inflicted by the naval law martial, and by which every member of the court is to be guided in passing sentence.

If a prisoner is found guilty of a crime in the punishment of which there is no alterna-

tive, any further consideration becomes unnecessary, otherwise than recommending him as an object of mercy, if thought deserving. If convicted of an offence punishable at the discretion of a court martial, the obvious and only question is—what punishment shall be inflicted on the prisoner, who is found guilty?

But in cases where an optional power is vested in the court, to punish with death *or otherwise*, the question to follow that of *guilty, or not guilty* (upon the court, or the majority of it, declaring for the former) is—whether or not, the prisoner shall suffer death? If the majority of the court do not concur in the affirmative, the next question necessary to be proposed to every member indiscriminately is—what punishment, *other* than death, shall the prisoner undergo? Both questions, at a naval court martial, can be carried by the same majority, even by one voice. The naval instructions or articles of war make no distinction as to the number of votes, that are requisite to form a majority to pronounce sentence of death, from any other punishment; whereas in the army, nine out of thirteen, or two-thirds of the members, (if more than thirteen)

must concur and agree in opinion, before sentence of death can be pronounced.

Should it ever be contested, that a member is not compellable to give his voice for any other punishment, having once given his vote for death—(for the strict right can never be brought to a decision in the person of any individual, as the very stating of the matter would tend to disclose the particular vote); it must of necessity be, either that those who voted for a capital punishment are silent, or acquiesced with the majority whose opinions carried the votes against sentence of death, in the proportion of punishment adjudged to be inflicted on the offender.

It may be necessary, however, that where there is a diversity of opinion, the Judge Advocate should retain *private* memorandums of the votes of each individual member; that he may be prepared to give evidence thereof, if called upon in a court of justice, should an act of parliament be passed to release him from his oath.

Naval law martial is laid down in general in a manner so explicit, that every officer and seaman is or ought to be acquainted with what are thereby deemed crimes; and

may judge, in most cases, what is to be expected by such as are guilty. At the same time, every seaman has the satisfaction to know that he must previously be convicted by a tribunal, where, while the guilty cannot escape, justice and honour invariably preside; where innocence and integrity have nothing to apprehend; and where consideration is never denied to those who err through simplicity and ignorance only.

CHAPTER XIV.

OF THE FORM OF DRAWING OUT THE SENTENCE OF A COURT MARTIAL.

THE usual form of drawing up a sentence, after recapitulating the authority by which the court is assembled to inquire into the charge exhibited against the prisoner (which is mentioned) states—that the court, having heard the evidence, and the prisoner's defence, and maturely and deliberately considered the whole, is of opinion that the charge is fully, or partly proved, or not proved; and that the court doth adjudge, &c. &c. or acquit, &c. &c.; and that the prisoner is hereby, &c. &c. accordingly; without describing the particular article of war, under which the offence falls. Such has been the practice at naval courts martial for more than twenty-five years past; and yet, I am not apprised of any law or authority countenancing this omission. A motive assigned for the custom, is to avoid the inconvenience attending the revision of a sentence, by appeal to a superior court at common law; where, should it be proved that the offence did not fall precisely under

the particular article specified in the sentence by which judgment was given, the whole might be deemed illegal, and the president and members of the court martial, liable to prosecution for a false judgment: yet the members of the court, in their deliberation, must give an opinion as to the article under which the prisoner falls; otherwise they could not proportion the punishment, agreeable to the directions of the act.

When the prisoner's offence has not been proved, and he is honourably acquitted, the court, in order strongly to mark their disapprobation of the prosecutor's conduct (where the evidence he brings in support of the charge has not been able to establish a proof, but grossly failed, by not substantiating the accusation) have frequently inserted in the sentence, "that the charge was *malicious* and ill-founded." But, as I do not recollect that such severe and mortifying reflections have ever been cast on a prosecutor, who was not subordinate and inferior to the person brought to trial; most probably it was then done with a view to deter inferior officers from accusing their superiors.

Now, although it may appear that an accusation originated in malice, a declara-

tion to that effect must nevertheless be considered as an *extra judicial proceeding*; the court being convened in order to try the prisoner, and not to ascertain the motives of the prosecutor.—If indeed, during the trial, it should be discovered that the prosecutor himself had been faulty or negligent in the performance of his duty, on points connected with the offence charged against the prisoner, the court have a right to represent his conduct to the Admiralty, and to submit to their lordships, the propriety of bringing the prosecutor to a court martial.

It is not the general practice of the court, to permit the prosecutor to animadvert, on the close of the evidence of the witnesses called upon by the defendant; or to reply to the defence he makes, by explaining the motives and merits of the case, which induced him to bring forth his charges: but although it is not customary so to do, yet it cannot be denied that it is claimed as a right, and practised in all other courts of judicature, nor unprecedented even in naval courts martial. The captains who accused Admiral Knowles, were heard in observation on the evidence, and in reply to the defence; and Admiral Knowles was also heard in obser-

vation on the evidence, and in reply to the defence of his captains, on four several trials.

These courts martial were ordered in consequence of complaints against the admiral, by his captains, &c. for his conduct in the action with the Spanish fleet, commanded by Admiral Reggio, off the Havanah, the 1st October 1748. It is no objection to this practice, that the trial of Admiral Knowles took place antecedently to the act of the 22d George IIId.; since nothing is there inserted, that excludes the prosecutor from the right of commenting on the evidence in favour of the prisoner, or what is advanced in his defence. This privilege was however over-ruled by the court, in every stage of Admiral Keppel's trial.

The word *unanimous* is frequently inserted in sentences of acquittal, in order to give greater energy and weight in restoring the officer to the good opinion of his country, and efface the stain, or tarnish, his reputation might have suffered from the accusation brought against him; from which, he is *honourably* acquitted. This was the case in Admiral Keppel's sentence of acquittal, in the year 1779. Although, therefore, the members of a court martial may sometimes be unanimous in their votes and

opinions to condemn a prisoner, as well as to acquit, yet that word is seldom inserted in the former instance; as there is not that strength of expression required to add force to a judgment of condemnation, as is necessary in one of acquittal: however, the word *unanimous* was used in the sentence by which Admiral Mathews was cashiered in the year 1746.

While wording the sentence of a court martial for the acquittal of an officer, great attention should be had to particular expressions. In support of this remark, I shall refer to the sentence of acquittal of Captain Evelyn Sutton, commander of the *Isis*, brought to a court martial at Portsmouth, in December 1783, on a charge preferred against him by Commodore George Johnstone, commander-in-chief of a squadron of his Majesty's ships (on a particular service, when in Porta Praya Road, one of the Cape de Verd islands) who were attacked by a squadron of French ships under Monsieur Suffrein, on the 16th April 1781. The sentence concludes in these words—

“The court is of opinion, that it appears to them, that the prisoner did not delay or discourage the public service, on which he was ordered on the 16th April 1781; that

from the circumstances proved, and the condition the Isis was in, it appears to the court, that the prisoner was *justifiable* in not immediately cutting or slipping the cable of the Isis, after his getting on board her on that day ; and that after the wreck of the foremast had been cleared, the prisoner did his utmost to gain his station in the line of battle, and that the Isis was in her station about sun-set that day ; the court doth hereby adjudge the said Captain Evelyn Sutton to be *honourably acquitted* of the *whole* of the charge, and he is hereby honourably acquitted accordingly."

Though a court martial can restore credit and reputation to an officer, it has no power to award pecuniary damages for injuries which may have been sustained in consequence of suspension. Captain Sutton entered his action against Commodore Johnstone, for having maliciously, and without any reasonable and probable cause, suspended him from the command of the Isis, and sent him to the East Indies under arrest ; keeping him under suspension from the 22d day of April 1781, to the 11th December 1783. After a verdict in the Court of Exchequer, on two separate trials, wherein damages (on the first 5,000*l*.

on the second 6,000*l.*) were given against Commodore Johnstone ; the cause was moved to be argued at bar, before all the judges of the Exchequer court, in order to arrest the judgment. This, however, was confirmed by that court : though it was afterwards reversed by Lord Mansfield, then chief judge of the court of King's Bench, and Lord Loughborough, chief judge of the court of Common Pleas ; and finally set aside, in the House of Lords, against Captain Sutton.

I shall here insert part of Baron Eyre's speech, when he discharged the rule for arrest of judgment, by which the verdict for damages was confirmed, as far as it relates to the word *justifiable*. No doubt the court adopted this as a strong *term* in favour of Captain Sutton ; such a one as could not be interpreted to his disadvantage, by supplying the Commodore with a weapon to assist him in support of the *essential* ground of the action, which was for a prosecution *without probable cause*.

*Extract of Part of Baron Eyre's Speech, on the
Motion to arrest Judgment, in the Case of*

SUTTON *versus* JOHNSTONE.

“THE sentence not being examinable here, I am relieved from the difficulty of comprehending what circumstances can amount to a *justification* of a subordinate officer, in disobeying the orders of his superiors.

“We are bound by the sentence to understand, that some how or other, the plaintiff in this case, does stand *justified*; but the question is, whether we are not also bound to conclude from this sentence, that he did in fact disobey; and whether that be not *probable cause* for bringing him to a court martial, there to justify himself for that disobedience? Doubtless, a court martial is not bound to express itself in technical language; and the court martial may have used, in this case, the word *justifiable*, in some sense different from our notions of justification: but having acquitted the plaintiff generally, upon the charge of delaying the public service, which was one of the two specific charges brought against him; and having made his special acquittal, upon the charge of disobedience of orders; it does seem, as if they meant to say, that he did not delay the

public service, but that he did disobey the order, and for some reason satisfactory to them, was justified in that disobedience. If this be the true meaning of the sentence, will not the fact of disobedience, thus established, be a *probable cause* for bringing him to a court martial? If the defendant is upon this declaration to be taken to be ignorant; or if he is not averred to be cognizant, of all the circumstances, which constituted to the justification, I should in that case hold most clearly, that it would be probable cause, &c. &c."

Courts martial possess considerable discretionary power as to the extent and measure of the punishment to be inflicted by the sentence they shall judge proper to pronounce against the prisoner. By statute of the 22d George II. together with the alterations and amendment made by the 19th George III. they are only restricted from exercising this power of mitigation, in cases where the offence falls under the following naval articles of war—the *third, fifteenth, twenty-fifth, twenty-eighth, twenty-ninth*, the latter part of the *tenth*, the first part of the *nineteenth*, and first part of the *twenty-second*; articles by which, if proved, judgment of death must be pronounced: by the articles

eighteenth, thirty-first and thirty-third, together with part of the sixteenth, if the charge is proved, the offender must be cashiered.

The court being at liberty to soften the rigour of punishment, for all offences that come under any of the other articles, the punishment of degrading commission officers from the rank they hold, and obliging them to serve in his Majesty's naval service, in an inferior capacity, is not generally inflicted. The sentence usually pronounced, is that of being deprived of the office they hold in the ship, by which they are continued on the half-pay list; or if the offence is of a great magnitude (yet not so as to be capital) they are rendered incapable of ever serving in his Majesty's naval service, his heirs and successors, by which means the officer is deprived of his half-pay, but is entirely cleared from any claim the service may have on him.

Since I have been in the navy, I know of no commission officer having been degraded from his rank, to serve in an inferior capacity, except in the instance of Lieutenant Thackeray of the Thorn sloop. This gentleman was tried by a court martial in January 1789; by which he was sentenced to serve

as a midshipman, on board such of his Majesty's ships, as the Lords Commissioners of the Admiralty should think proper to direct*.

Whether this sentence was devised to afford him an opportunity of being re-instated in the service, I cannot tell; but he shortly after went out in the commanding officer's ship, appointed to the Jamaica station. There is no article of war that expressly directs such degradation, except in the words "such other punishment as the nature of the offence shall deserve, and the court martial shall impose;" which are expressions of great and almost unbounded latitude. All commissioned officers in the navy, are only links of one great chain: if, therefore, it is consistent and legal to pronounce sentence of degradation on officers of one particular class in rank and order, why not follow it up to superior rank? Then might be exhibited a master and commander, reduced to serve as a lieutenant; or a post captain, as a master and commander; or an admiral, as a post captain;—examples that are not to be found, I believe, in the whole extent of our naval annals.

* See page 130, &c. of this Treatise.

Officers have been sentenced to lose some years of their seniority in rank, as post captains; and placed either at the end, or, according to the time of deprivation, on other parts of the list. In the East Indies, Captain William Brereton, in the year 1761, was sentenced to lose and be deprived, for a certain number of years, of the rank of post captain. Some time after his return to England, on stating particular circumstances in his case; among others, that some of the captains, *who tried him*, derived benefit by the sentence they pronounced against him, being thereby advanced on the list of post captains; he was restored to his former rank and place on the list of post captains.

This is an instance of degradation in seniority of rank, but not of rank itself: otherwise he might, conformably with the before-mentioned system of punishment, have been deprived of the rank *altogether*, and reduced to that of a master and commander.

No instance, I believe, can be produced of a commission officer in the army, ranking as ensign or lieutenant, being degraded, by the sentence of a court martial, to serve as a non-commissioned officer in any regiment or troop in his Majesty's land forces.

Memorandum.—A court martial was held on Tuesday, 8th of March, 1796, on board his Majesty's ship Orion, in Portsmouth Harbour, for the trial of Captain Thomas Affleck, for the loss of his Majesty's ship Amethyst; when the following sentence was read by Moses Greatham, Esq. Deputy Judge Advocate:

“ That the loss of his Majesty's ship Amethyst was occasioned by her striking on a rock near the Island of Guernsey, and by a hole being thereby beaten in her bottom, and that the same was attributable to the misconduct of the said Captain Thomas Affleck.

“ The court doth adjudge him to be reduced from his rank on the list of post captains to the bottom of the said list*, and to be incapable of being again employed in his Majesty's naval service, for the remainder of his life; and the court further *agree*, that the loss of the said ship was not attributable to any misconduct in any other of the officers or company of the said ship, and do adjudge them to acquitted.

“ And the said Captain Thomas Affleck is hereby sentenced to be reduced from his

* He was about 107 from the bottom of the list.

rank on the list of post captains, to the bottom of the said list; and to be incapable of being again employed in his Majesty's naval service, for the remainder of his life; and the officers and company of the said ship, are also hereby acquitted of any misconduct accordingly."

Observation.—It appears a kind of unnecessary punishment, to degrade an officer in rank, on the list of post captains, when he is sentenced to be incapable of being ever employed again in his Majesty's naval service during his natural life.

It may be, that although the sentence does not deprive him of half-pay, yet, by being placed on the list 107 names below where he stood, it will prevent him from getting on the 10s. list, until the officers now placed before him, have arrived to such seniority, and come within the number that are intitled to the daily stipend of 10s. half-pay.

CHAPTER XV.

OF APPEALS.

IN the navy, after sentence has been pronounced, application has sometimes been made to arrest the judgment, and have execution stayed, till the opinion of his Majesty's law officers, and of the judges of the land, should establish the legality of the sentence. Such was the case, in the judgment pronounced by the court martial against Admiral Byng. As the circumstances attending this trial will ever remain memorable in the naval annals of the country, it may not be deemed improper, in a work of this nature, to insert the sentence, together with the representation made to the Lords of the Admiralty by the members of that court martial, on the necessity they were under of passing such a sentence.

At a court martial assembled on board his Majesty's ship St. George, in Portsmouth Harbour, on the 28th day of December, 1756 ; and held every day afterwards (Sun-

days excepted) till the 27th day of January, 1757, inclusive ;—

PRESENT,

Thomas Smith, Esq. Vice-admiral of the Red, President.
Francis Holburne, Esq. Rear-admiral of the Red.
Harry Norris, Esq. Rear-admiral of the White.
Thomas Broderick, Esq. Rear-admiral of the Blue.

CAPTAINS.

Charles Holmes.
William Boys.
John Simcoe.
John Bentley.
Peter Dennis.

Francis Geary.
John Moore.
James Douglas.
Hon. Augustus Keppel.

The court, pursuant to an order from the Lords Commissioners of the Admiralty to Vice-admiral Smith, dated the 14th December, 1756, proceeded to enquire into the conduct of the Hon. John Byng, admiral of the blue squadron of his Majesty's fleet, and to try him upon a charge,—that during the engagement between his Majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did withdraw or keep back, and did not do his utmost to take, seize, and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his Majesty's ships as were engaged in fight with the French ships, which it was his duty

to have assisted ; and for that he did not do his utmost to release St. Philip's Castle, in his Majesty's island of Minorca, then besieged by the forces of the French king, but acted contrary to, and in breach of his Majesty's command ; and having heard the evidence, and the prisoner's defence, and very maturely, and thoroughly considered the same, they are *unanimously* of opinion—that he did not do his utmost to relieve St. Philip's Castle, and also that during the engagement between his Majesty's fleet under his command, and the fleet of the French king (on the 20th of May last) he did not do his utmost to take, seize, and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his Majesty's ships, as were engaged in fight with the French ships, which it was his duty to have assisted ; and do therefore *unanimously* agree, that he falls under part of the 12th article of an act of parliament made in the 22d year of his present Majesty's reign, for amending, explaining, and reducing into one act of parliament, the laws relating to the government of his Majesty's ships, vessels, and forces by sea ; and as that article positively prescribes death, without any alternative left to the discretion of the court, under

any variation of circumstances, the court do therefore hereby unanimously adjudge the said Admiral John Byng to be shot to death, at such time, and on board such ship, as the Lords Commissioners of the Admiralty shall direct.

But as it appears by the evidence of Lord Robert Bertie, Lieutenant Colonel Smith, Captain Gardner, and other officers of the ship who were near the person of the Admiral, that they did not perceive any backwardness in him during the action, or any marks of fear or confusion, either from his countenance or behaviour, but that he seemed to give his orders coolly and distinctly, and did not seem wanting in personal courage, and from other circumstances, the court do not believe that his misconduct arose either from cowardice or disaffection ; and do therefore *unanimously* think it their duty, most earnestly to recommend him as a proper object of mercy.

THOMAS SMITH. FRA. HOLBURNE.

H. NORRIS. THO^S BRODERICK.

CHA^S HOLMES. FRAN^S GEARY.

W. BOYS. JN^O MOORE.

J. SIMCOE. JAMES DOUGLAS.

J. BENTLEY. A. KEPPEL.

PET. DENNIS.

CHA. FEARNE, Jud. Ad.

The members of the court also drew up a representation to the Lords of the Admiralty, and signed the same, as follows—

To the Right Honourable the Lords Commissioners for executing the Office of Lord High Admiral of Great Britain, &c.

WE the underwritten, the president and members of the court martial assembled for the trial of Admiral Byng, believe it unnecessary to inform your Lordships, that in the whole course of this long trial, we have done our utmost endeavours to come at truths, and to do the strictest justice to our country and the prisoner; but we cannot help laying the distresses of our minds before your Lordships on this occasion, in finding ourselves under a necessity of condemning a man to death, from the great severity of the 12th article of war, part of which he falls under, and which admits of no mitigation, even if the crime should be committed by an error in judgment only; and therefore, for our own consciences sake, as well as in justice to the prisoner, we pray your Lordships, in the most earnest man-

ner, to recommend him to his Majesty's clemency ;—

We are, my Lords,
Your Lordships' most obedient
and most humble servants,

THOMAS SMITH.	FRA. HOLBURNE.
H. NORRIS.	THO ^S BRODERICK.
CHA ^S HOLMES.	FRAN ^S GEARY.
W. BOYS.	JN ^O MOORE.
J. SIMCOE.	JAMES DOUGLAS.
J. BENTLEY.	A. KEPPEL.
PET. DENNIS.	

St. George, in Portsmouth
Harbour, January 27, 1757.

In consequence of the foregoing remonstrance, the Lords Commissioners of the Admiralty laid the following memorial before his Majesty :

TO THE KING'S MOST EXCELLENT MAJESTY.

MAY IT PLEASE YOUR MAJESTY,

BY an act of the twenty-second year of your Majesty's reign, intituled, “ an act for amending, explaining, and reducing into one act of parliament, the laws relating to the government of your Majesty's ships, vessels, and forces by sea,” it is enacted—“ That no

sentence of death, given by any court martial held within the narrow seas (except in cases of mutiny), shall be put in execution till after the report of the proceedings of the said court shall have been made to the Lord High Admiral, or to the Commissioners for executing the office of High Admiral; and his, or their directions shall have been given therein."

In pursuance of this act, the proceedings of the court martial held upon Admiral Byng have been reported to us, for our directions therein, which proceedings we have taken into our most serious and deliberate consideration; and doubts having arisen with regard to the legality of the sentence, particularly whether the crime of negligence, which is not expressed in any part of the proceedings, can, in this case, be supplied by implication; we find ourselves obliged most humbly to beseech your Majesty, that the opinion of the judges may be taken, whether the said sentence is legal.

For this purpose, we beg leave to lay before your Majesty a copy of the charge as delivered to Admiral Byng, and likewise a copy of the thirty-seven resolutions of the court martial, upon which the sentence is formed, together with a copy of the sentence itself, and of a representation of the same

date therewith, signed by the president and court martial ; and likewise copies of two petitions from George Lord Viscount Torrington, in behalf of Admiral Byng ; most humbly submitting the whole to your Majesty's royal wisdom and determination.

TEMPLE.

GEO. HAY.

THO. ORBY HUNTER.

GILB. ELLIOT.

J. FORBES.

Admiralty Office,
9th February, 1757.

COPY OF THE TWO PETITIONS,

From George Lord Viscount Torrington, mentioned in the preceding memorial.

To the Right Honourable the Lords Commissioners for executing the Office of Lord High Admiral of Great Britain.

THE humble memorial of George Lord Viscount Torrington, nephew of the unhappy Admiral John Byng, in behalf of himself and the rest of the family,

MOST HUMBLY SHEWETH,

That the said Admiral having been tried by a court martial for a breach of the articles of war, was adjudged by the said court to have fallen under part of the 12th article of an act of parliament passed in the

22d year of his present Majesty, for amending, explaining, and reducing into one act of parliament the laws relating to the government of his Majesty's ships, vessels, and forces by sea; and the said court having sentenced the said Admiral to be shot to death, at such time and place as your Lordships shall direct, but in their sentence unanimously declared that they did not believe his misconduct arose either from cowardice, or disaffection, and therefore recommended him to your Lordships as an object of mercy; and declared that the said court martial were under the necessity of condemning him to death, from the great severity of the said 12th article of war, which admits of no mitigation, though the offence be a mere error in judgment only.

That by the law of the land, every person who is indicted for any offence, and has been tried and convicted upon such indictment, has a certain time given him by law, for moving in arrest of judgment, and offering to the court his reasons, why judgment should not be carried into execution.

That from the nature of proceedings before a court martial, no such motion can be made, as your memorialist is advised, to the said court martial; but by the act of parliament of the 22d of his present Majesty, it is

enacted, that no sentence of death given by any court martial (except in cases of mutiny) shall be put in execution, till after report of the proceedings of the said court shall have been made to your Lordships, and your directions shall have been given therein.

That neither in the sentence of the said court martial, nor in the letter of recommendation accompanying the same, does the Admiral appear to have been guilty, nor is he found guilty of any offence intended by law, and particularly by the said 12th article, to be punished with death ; wherefore the sentence passed upon the Admiral cannot, as your memorialist is advised, be justified in point of law.

That the said Admiral being now a close prisoner at Portsmouth, and incapable of taking proper care of his own defence, your memorialist, as his nephew, and at the desire of his afflicted family, being advised that many very material things may be offered to your Lordships, to shew that the said sentence of the court martial ought not to be executed upon the Admiral, are desirous of laying the same before your Lordships, on behalf of the said Admiral, if indulged with an opportunity of so doing.

Wherefore your memorialist most humbly

prays your Lordships' permission, to lay before your Lordships, by counsel to be appointed on behalf of the said Admiral, such reasons as may be offered to your Lordships, against the carrying the said sentence into execution, or that the said Admiral may have such other relief in the premises, as to your Lordships, in your great wisdom and goodness, shall seem meet.

And your memorialist shall ever pray,
&c. &c.

TORRINGTON.

To the Right Honourable the Lords Commissioners for executing the Office of Lord High Admiral of Great Britain, &c.

THE humble petition of George Lord Viscount Torrington, nephew of the unhappy Admiral John Byng, on behalf of himself, and the rest of his afflicted family,

MOST HUMBLY SHEWETH,

That your Lordships having been graciously pleased, in answer to your petitioner's memorial delivered this day, to signify to your petitioner by your secretary, that your Lordships were ready to receive your petitioner's reason in writing as to-morrow, why the sentence of the court martial should

not be executed on the Admiral, your petitioner immediately thereupon applied to some gentlemen of eminence in the profession of the law to advise and assist your petitioner in assigning the said reasons, which they are willing to do ; but alledge, that by their indispensable attendance on the several courts of law and equity towards the close of the term, they cannot so soon be prepared to advise and assist your petitioner therein :

Wherefore your petitioner most humbly prays your Lordships' indulgence to grant him a few days only, to deliver to your Lordships the reasons, in writing, against executing the said sentence.

And your petitioner as in duty bound shall ever pray, &c.

TORRINGTON.

On the day of the date of their Lordships' memorial to his Majesty, it was presented ; and an order in council was immediately issued to the judges, to make their report respecting the legality of the sentence. In a week after, the following order in council, and the Judges opinion, were inclosed to the Lords of the Admiralty.—

Copy of the King's order in council, for transmitting a copy of the report of the twelve Judges, in relation to the sentence upon Admiral Byng, to the Lords Commissioners of the Admiralty; with a copy of the Judges report, annexed thereto.

(L. S.) At the Court of St. James's, the 16th February, 1757.

PRESENT,

The KING's Most Excellent MAJESTY.

Lord President.	Viscount Falmouth.
Lord Privy Seal.	Viscount Bateman.
Lord Chamberlain.	Lord Delawarr.
Duke of Bedford.	Lork Berkeley of Stratton.
Duke of Devonshire.	Lord Bathurst.
Duke of Argyll.	Lord Edgcumbe.
Duke of Dorset.	Lord Sandys.
Earl of Sandwich.	Lord Lyttelton.
Earl of Holderness.	Sir John Willes, First Lord
Earl of Rochford.	Commissioner of the Great
Earl of Cholmondeley.	Seal.
Earl of Hyndford.	Mr. Comptroller.
Earl of Halifax.	Mr. Vice Chamberlain.
Earl of Buckinghamshire.	Sir John Rushout.
Earl Temple.	George Doddington, Esq.
Earl of Harcourt.	Sir Thomas Robinson.
Earl Cornwallis.	

Whereas his Majesty was pleased, upon a representation from the Lords Commissioners of the Admiralty, to refer the sentence of the court martial of the 27th of January last

upon the trial of Admiral Byng, to the twelve Judges, to consider thereof, and report to his Majesty at this board, their opinion, whether the said sentence is legal ; and whereas all the said judges have reported to his Majesty at this board, that they have considered the said sentence, together with the twelfth article therein referred to, and are unanimously of opinion, that it is a legal sentence ; his Majesty, in council, is thereupon pleased to order, that a copy of the said report of the twelve Judges (which is hereunto annexed) be transmitted to the said Lords Commissioners of the Admiralty.

W. SHARPE.

TO THE KING'S MOST EXCELLENT MAJESTY
IN COUNCIL.

MAY IT PLEASE YOUR MAJESTY,

IN obedience to your Majesty's commands, signified to us by an order bearing date the 9th of this instant February, whereby it is referred to us, to consider the sentence of the court martial of the twenty-seventh of January last, upon the trial of Admiral Byng, a copy whereof is thereunto annexed, and to report to your Majesty at the council board, whether the said sentence is legal :

We have considered the said sentence, together with the twelfth article referred to, and are unanimously of opinion, that it is a legal sentence.

MANSFIELD.

THOS. BIRCH.

J. WILLES.

H. LEGGE.

T. PARKER.

S. S. SMYTH.

T. DENNISON.

RICHD. ADAMS.

M. FOSTER.

HENRY BATHURST.

E. CLIVE.

J. E. WILMOT.

February 14th, 1757.

A true Copy of the Original.

Examined by me,

W. SHARPE.

On receiving the documents just specified, the Lords Commissioners of the Admiralty issued their warrant, to carry the sentence into execution: of which warrant, the following is a copy—

(L. S.) By the Commissioners for executing the office of Lord High Admiral of Great Britain and Ireland, &c.

Whereas at a court martial, assembled on board his Majesty's ship St. George, in Portsmouth Harbour, upon the 28th of December, 1756, and held every day after-

wards, Sundays excepted, till the 27th of January, 1757, inclusive, Thomas Smith, Esq. Vice Admiral of the Red, president, a sentence was given to the following effect, viz.

“ The court, pursuant to an order from the Lords Commissioners of the Admiralty to Vice-admiral Smith, dated the 14th of December, 1756, proceeded to enquire into the conduct of the Honourable John Byng, admiral of the blue squadron of his Majesty's fleet, and to try him upon a charge, that during the engagement between his Majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did withdraw or keep back, and did not do his utmost to take, seize, and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his Majesty's ships as were engaged in fight with the French ships, which it was his duty to have assisted; and for that he did not do his utmost to relieve St. Philip's Castle in his Majesty's island of Minorca, then besieged by the forces of the French king, but acted contrary to, and in breach of his Majesty's command; and having heard the evidence, and the prisoner's defence, and very maturely and thoroughly considered

the same, they are unanimously of opinion, that he did not do his utmost to relieve St. Philip's Castle; and also that during the engagement between his Majesty's fleet under his command, and the fleet of the French king, on the 20th of May last, he did not do his utmost to take, seize, and destroy the ships of the French king, which it was his duty to have engaged, and to assist such of his Majesty's ships as were engaged in fight with the French ships, which it was his duty to have assisted; and do therefore unanimously agree, that he falls under part of the 12th article of an act of parliament of the 22d year of his present Majesty, for amending, explaining, and reducing into one act of parliament the laws relating to the government of his Majesty's ships, vessels, and forces by sea; and as that article positively prescribes death, without any alternative left to the discretion of the court under any variation of circumstances, the court do therefore hereby unanimously adjudge the said Admiral John Byng to be shot to death, at such time, and on board such ship, as the Lords Commissioners of the Admiralty shall direct."

"And whereas, upon laying the said sentence before the King, his Majesty hath

been pleased to consent, that the same shall be carried into execution; we do therefore, in pursuance of his Majesty's consent, hereby require and direct you to carry the sentence of the said court martial into execution accordingly, on Monday the twenty-eighth instant*, by causing him, the said Admiral John Byng, to be shot to death, by a platoon of marines, on board such one of his Majesty's ships in Portsmouth Harbour as you shall think expedient or fit, for which this shall be your warrant: given under our hands, and the seal of the Office of Admiralty, the sixteenth day of February, 1757.

TEMPLE.

GEO. HAY.

THOS. ORBY HUNTER.

GILB. ELLIOT."

To the Honourable Edwd. Boscawen, Vice-admiral of the White, and Commander-in-chief of his Majesty's ships at Portsmouth; or to the Commander-in-chief there, for the time being.

By command of their Lordships,

J. CLEVELAND.

* The sentence was not carried into execution until the 14th of March following.

This warrant for execution was declined to be signed by Admiral John Forbes, then one of the Lords of the Admiralty; who gave his reasons in writing, as are here-under transcribed.

“ It may be thought great presumption to differ from so great an authority as that of the twelve judges; but when a man is called upon to sign his name to an act which is to give authority for the shedding of blood, he ought to be guided by his own conscience, and not by the opinions of other men.

“ In the case before us, it is not the merit of Admiral Byng that I consider; whether he deserves death or not, is not a question for me to decide; but whether, or not, his life can be taken away by the sentence pronounced upon him by the court martial; and after having so clearly explained their motives for pronouncing such a sentence, this is the *point alone* that has employed my most serious attention.

“ The 12th article of war, upon which Admiral Byng's sentence is founded, says (according to my understanding of its meaning) that every person who shall in time of action, withdraw or keep back, or not come into the fight, or who shall not do his utmost,

&c. through motives of cowardice, negligence, or disaffection, shall suffer death: the court martial does, in express words, acquit Admiral Byng of cowardice, and disaffection; and does not name the word negligence. Admiral Byng, therefore, does not, *as I conceive*, fall under the letter, or description of the 12th article of war; it may be said, that negligence is implied, though the word is not named, otherwise the court martial would not have brought this offence under the 12th article of war, having acquitted him of cowardice or disaffection, and he is expressly acquitted of both. These crimes, besides crimes which are implied only, and are not named, may indeed justify suspicion, and private opinion; but cannot satisfy the conscience, in case of blood.

“ Admiral Byng’s fate was referred to a court martial, his life and death was left to their opinions; the court martial condemn him to death, because (as they expressly say) they were under a necessity of doing so, by reason of the letter of the law, the severity of which they complain of, because it admits of no mitigation. The court martial expressly says, that for the sake of their consciences, as well as in justice to the prisoner, they do in the most earnest manner recom-

mend him to his Majesty for mercy: it is then evident, that in the opinion and consciences of his judges he was not deserving death.

“ The question then is, shall the opinions, or the necessity of the court martial, determine Admiral Byng's fate? if it should be the latter, he will be executed contrary to the intentions and meaning of his judges, who (to do justice) do most earnestly recommend him for mercy; and if it should be the former, his life is not forfeited. His judges declare he is not deserving death; but mistaking either the meaning of the law, or the nature of the offence, they bring him under an article of war which, according to their own description of his offence, he does not (*I conceive*) fall under; and they condemn him to death, because (they say) the law admits of no mitigation.

“ Can a man's life be taken away by such a sentence? I would not willingly be misunderstood, and have it believed that *I judge* of Admiral Byng's deserts. That was the business of the court martial, and it is my duty to act, *only according to my conscience*, which after mature and deliberate consideration, and assisted by the best lights that a poor understanding is capable of affording,

remains still in doubt ; and therefore I cannot consent to sign a warrant, whereby the sentence of a court martial may be carried into execution ; for I cannot help thinking, that however criminal Admiral Byng may be, his life is not forfeited by that sentence. I do not mean to find fault, in the least, with the opinions of other men : all I endeavour at, is to give reasons for my own ; and all I desire, and wish is, that my meaning may not be misunderstood. I do not pretend to judge of Admiral Byng's desert, nor to give my opinion of the propriety of the act.

J. FORBES."

Admiralty Office,
16th February, 1757.

Execution did not take place till the 14th of March, when the unfortunate admiral, the Honourable John Byng, a few minutes before he finally closed his earthly career, delivered a paper to William Brough, Esq. Marshal of the High Court of Admiralty, of which the following is a genuine copy, having first spoke to him these words :

" SIR,

" These are my thoughts on this occasion, I give them to you, that you may authenti-

cate them, and prevent any thing spurious being published that might tend to defame me: I have given a copy to one of my relations."

Copy of the Paper delivered.

"A few moments will now deliver me from the virulent persecution, and frustrate the farther malice, of my enemies. Nor need I envy them a life subject to the sensations which my injuries, and the injustice done me, must create. Persuaded I am, justice will be done to my reputation hereafter. The manner and cause of raising and keeping up the popular clamour and prejudice against me, will be seen through: I shall be considered (as I now perceive myself) a victim, destined to divert the indignation and resentment of an injured and deluded people from the proper objects. My enemies themselves must *now* think me innocent. Happy for me, at this my last moment, that I know my own innocence, and am conscious that no part of my country's misfortunes can be owing to me. I heartily wish the shedding of my blood may contribute to the happiness and service of my country; but cannot resign my just claim

to a faithful discharge of my duty, according to the best of my judgment, and the utmost exertion of my ability, for his Majesty's honour, and my country's service. I am sorry that my endeavours were not attended with more success; and that the armament under my command proved too weak to succeed in an expedition of such moment.

“ Truth hath prevailed over calumny and falsehood, justice has wiped off the ignominious stain of my supposed want of personal courage or disaffection; my heart acquits me of these crimes. But who can be so presumptuously sure of his own *judgment*? If my crime is an error in judgment, or differing in opinion from my judges; and if yet, *the error in judgment should be on their side*, God forgive them! as I do. And may the distress of their minds, and uneasiness of their consciences, which, in justice to me, they have represented, be relieved and subside as my resentment has done.

“ The Supreme Judge sees all hearts, and motives; and to him I must submit the justice of my cause.

J. BYNG.”

On board his Majesty's ship
Monarque, in Portsmouth
Harbour, March 14th, 1757.

This appeal against the execution of the sentence of a court martial, is here selected on account of its interest and importance. Appeals, directed by the nature and circumstances of the case, may certainly be made on subjects of less moment.

CHAPTER XVI.

ENUMERATION OF PARTICULARS, IN WHICH COURTS MARTIAL, IN THE LAND AND SEA SERVICE, DIFFER FROM EACH OTHER.

AS the various laws and regulations enacted or established for the government of his Majesty's forces, both by sea and land, propose one common object—to retain the members of the different bodies in just subordination, and thereby render their collective powers more effectual for the defence of the country—it may not be unacceptable to the reader, at the close of this Treatise, to specify those essential particulars wherein the two services occasionally differ, in the administration of justice. Some remarks, not altogether foreign to the subjects of the present Work, will be dictated by this comparison.

A naval court martial cannot consist of more than *thirteen*, nor less than five members, of the rank of flag officers and post-captains, *then and there present*, and following in seniority after the president; except

in cases where five post captains cannot be had : then, so long as there are *three officers* of the rank of post captains, the number five may be completed by summoning and admitting officers who do not command post ships, but are of the rank of masters and commanders, to be members of the court. No legal court, however, can admit more than one or two masters and commanders ; as the number *five*, including the post captains, who must be either *three* or *four* in number, cannot be exceeded, so long as a master and commander is a member ; and this, in order that the majority may rest with the officers of superior rank. The number of members, both in respect to the greater or lesser number which constitute a court, is in no manner affected by the part of the world in which the court martial is held.

There is likewise no marked distinction in the navy, in assimilating the rank of the members, who compose a court martial, with that of the person who is to be tried. If their *ships are on the spot*, the same number, and of the same rank, must assemble for the trial of a common sailor, as for that of an admiral ; and there must always be a full court, when there are officers sufficient to

compose one. All must attend, who follow in seniority after the president, till the number *thirteen* is complete ; nor must any excuse be admitted, except in cases of absolute necessity, made known to the court, who are sole judges of the propriety thereof, and who are to direct the reason of such officer's absence to be inserted in the minutes of their proceedings. Neither the Lords of the Admiralty, or the commander-in-chief, or any other officer on detached service, empowered to order and assemble courts martial, have any authority to direct or ascertain the particular number of persons, of which a court martial shall consist*.

At courts martial in England, the president is the port admiral ; or, if there is a large fleet assembled at Spithead or Channel service, the officer second in command is ordered, by the Admiralty, to assemble the court, and to preside. On stations abroad, or foreign service, the commander-in-chief (who has a Commission to assemble courts martial) cannot preside, so long as the squadron of ships and vessels on the station, under his command, consists of more than five sail ; but he must direct his orders to

* Act 22, Geo. II. Chap. xxxiii. Sect. 13.

the second in command, to hold the court : unless, indeed, any material objections occur on account of his being particularly interested, or in case of illness, when, in either predicament, the third in command is ordered to preside.

In the army a general court martial, if assembled in Great Britain, or Ireland, and other parts beyond the seas, is not to be composed of less than *thirteen* commission officers. The president, who must not be under the degree of a field officer, is not to be the commander-in-chief, or governor of the garrison where the offender shall be tried*, except in Africa, or New South Wales, there a court martial may be composed of so small a number as *five* commission officers, though the president should not rank under the degree of a field officer; and if an officer of such rank cannot be had, then not under the degree of a captain. This law, therefore, specifies the lowest number of members that can constitute a court martial in the different parts of the world where such a tribunal may be assembled. But there is no restriction as to the number of members who may sit in addition to the established

* First and second article of the 16th section of Articles of War.

number of thirteen and five; by which means great latitude is given to the discretion of the Secretary at War, or the officer who may order the court to be assembled, with respect to what number it may be increased: a distinction is likewise made in the rank of officers who sit on the trial of a field officer, in which case no member can be under the degree of captain*.

In the act of parliament 22d of George II. chap. 33, the time of the day for holding courts martial is not specified; but in the general printed naval instructions, under the head of courts martial, the 3rd article states, "they are always to be held *in the forenoon*, in the most public part of the ship." It is accordingly the usage of the navy, though a court martial is sitting, and has concluded one trial in the morning of the day, never to proceed to another, unless it can be began before 12 o'clock at noon. The time of adjournment is left to the discretion of the court, who, in general, do not exceed 3 or 4 o'clock in the afternoon; but if there is a great probability of the trial being brought to a conclusion on the same day, the court continues to sit

* Ninth article, 16th section, of the Land Articles of War.

beyond that hour. However, it is *indispensably* necessary, so long as a trial continues, to adjourn from day to day.

“ If a commission * of goal delivery,” says Lord Chief Justice Hale, “ issues to A. B. &c. they sit one day, and forget to adjourn their commission, or the clerk forgets to enter the adjournment; a felony is committed the next day, and they proceed in sessions to take an indictment and give judgment of death against a malefactor; this judgment is erroneous, and the clerk of assizes shall never be permitted to amend the record, and enter an adjournment; and this judgment being erroneous, shall be reversed: but it makes not the judges guilty of murder or homicide, though in strictness of law their commission was determined by the first day’s session, without adjournment.” In this respect, courts martial stand in the same predicament.

Army courts martial are directed, by the mutiny bill, to sit only from the hours of eight o’clock in the morning till three o’clock in the afternoon †.

Sentences of naval courts martial, either

* Hale’s Hist Plac. Cor. p. 498.

† Ninth article, 16th section, of the Articles of War.

for punishment or acquittal, are carried by the vote of the majority of the members who compose the court; no distinction being made, that when the prisoner's offence is found to be a capital crime, the majority of votes must be by a greater number, to sentence a criminal to death, than for any other punishment; so that an offender may be found guilty by the majority of a single voice.

But in the army, sentence of death cannot be given, except *nine* of the members out of the *thirteen* (or, if more than thirteen compose the court, two-thirds of the members *at least*,) agree to the sentence; Africa, or New South Wales excepted, where *five* members, or more, may constitute a legal court, and where two-thirds of the members must accord in opinion—That is, if the number should be so small as *five*, then *three* must concur, in order to pronounce sentence of death*.

Here I shall transcribe the oaths directed by acts of parliament to be administered by the Judge Advocate to the members of a naval court martial, and the oath the Judge Advocate takes before the court, and the

* Eighth article of the 16th section of Articles of War.

oath he administers to each witness ; in order to shew wherein they differ from the oaths administered on general courts martial, in the army.

No sooner are the members of the court seated, than the audience are admitted, and the authority by which the court is assembled is publicly read. The Judge Advocate then administers the oaths to the flag officers and captains who compose the court ; who respectively lay their right hands on the Holy Evangelists, and repeat, after the Judge Advocate the following words *—

“ I, *A. B.* do swear, That I will duly ad-
 “ minister justice, according to the ar-
 “ ticles and orders established by an
 “ act passed in the twenty-second year
 “ of the reign of his Majesty King
 “ George the Second, for ‘amending,
 “ explaining, and reducing into one
 “ act of parliament, the laws relating
 “ to the government of his Majesty’s
 “ ships, vessels, and forces by sea,’
 “ without partiality, favour, or affec-
 “ tion ; and if any case shall arise,
 “ which is not particularly mentioned

* Sixteenth section of the Act 22 Geo. II. Chap. 33.

“ in the said articles and orders, I
 “ will duly administer justice accord-
 “ ing to my conscience, the best of
 “ my understanding, and the custom
 “ of the navy in the like cases: and I
 “ do further swear, that I will not, upon
 “ any account, at any time whatsoever,
 “ disclose or discover the vote or opi-
 “ nion of any particular member of
 “ this court martial, unless thereunto
 “ required by act of parliament.

“ So help me GOD.”

After which the president is authorized and required to administer to the Judge Advocate, or person officiating as such, an oath in the following words:—

“ I, *A. B.* do swear, That I will not, upon
 “ any account, at any time whatsoever,
 “ disclose or discover the vote or opi-
 “ nion of any particular member of
 “ this court martial, unless thereunto
 “ required by act of parliament.

“ So help me GOD.”

The form of the oath administered by the Judge Advocate to the witness, before he gives his evidence, is not specified in the act

of parliament, or naval instructions, but is generally in the following words,—

“ The evidence you shall give to the court
 “ respecting the charge against the
 “ prisoner to be tried, shall be the
 “ truth, the whole truth, and nothing
 “ but the truth.

“ So help me GOD.”

Although no Quaker, or person declaring himself such, while refusing to take the requisite oaths, can be admitted to any civil or military appointment, he may yet be engaged in both services, as a private soldier, or common seaman, and be heard as a witness, to give evidence in the course of a trial, either by a naval or military court martial. It will, therefore, be proper here to insert what the law has stated in respect to this mode of giving evidence.

A Quaker's affirmation is in these words, as preliminary to the subject or form of an oath, required from persons not of that sect:

“ I do solemnly, sincerely, and truly de-
 “ clare and affirm, &c. &c. &c.”

By the act of 7 and 8 of William and Mary (chap. 3. section 6.) no Quaker shall be qua-

lified or permitted to give evidence in any criminal cause, or serve on juries, or bear any office or place of profit in the government. But by the 8th George I. (chap. 6. sect. 2.) any person lawfully convicted of wilful, false, and corrupt affirming or declaring any matter or thing, which if sworn in the *usual form* would have amounted to wilful and corrupt perjury; he or she shall suffer as in cases of perjury. And by the 22d George II. (chap. 46.) it is declared, that in all cases, wherein by an act of parliament an oath shall be allowed or required, the *solemn affirmation of Quakers* shall be allowed instead of such oath, although no express provision be made for that purpose in such act.

Such are the forms and oaths now administered at naval courts martial. Before the 25th of December, 1749, the oath that is first taken at an army court martial, beginning, “You shall well and truly try, &c. &c.” was administered to sea officers also.

In army general courts martial, the Judge Advocate administers the following oath upon the Holy Evangelists, to every member, by way of charge to the judges:

“ You shall well, and truly try and de-
 “ termine, according to your evidence
 “ in the matter now before you*.

“ So help me GOD.”

Then the Judge Advocate administers
 the following oath to all the members:

“ I, *J. A.* do swear, That I will duly ad-
 “ minister justice according to the rules
 “ and articles for the better government
 “ of his Majesty’s forces, and accord-
 “ ing to an act of Parliament *now* in
 “ force for the punishment of mutiny
 “ and desertion, and other crimes there-
 “ in mentioned, without partiality, fa-
 “ vour, or affection; and if any doubt
 “ shall arise, which is not explained by
 “ the said articles, or act of parliament,
 “ according to my conscience, the best
 “ of my understanding, and the custom
 “ of war in like cases: and I further
 “ swear, that I will not divulge the
 “ sentence of the court, until it shall
 “ be approved by his Majesty, or by
 “ some person duly authorized by him;
 “ neither will I, upon any account, at

* Mutiny Act, sect. 7; Articles of War, sect. 16, arti-
 cle 6.

“ any time whatsoever, disclose or dis-
 “ cover the vote or opinion of any par-
 “ ticular member of the court martial,
 “ unless required to give evidence
 “ thereof, as a witness, by a court of
 “ justice, in a due course of law.

“ So help me GOD.”

The president then administers to the Judge Advocate an oath, in the following words:

“ I, *A. B.* do swear, That I will not upon
 “ any account, at any time whatso-
 “ ever, disclose or discover the vote or
 “ opinion of any particular member
 “ of the court martial ; unless required
 “ to give evidence thereof, as a witness,
 “ by a court of justice, in a due course
 “ of law.

“ So help me GOD.”

It is to be observed, that the Judge Advocate does not take an oath to keep the sentence secret, until approved, as the members of the court martial do; by which he is at liberty to consult the law officers on a sentence, should it turn on a point of law.

The oath administered to the witnesses, before they give evidence, is not particularly inserted in the mutiny bill; but it is to the same purport as in other courts of judicature.

From the prohibitory part of the oath taken by the members of a naval court martial, not to discover the vote or opinion, &c. they can be released by an act of parliament only; so that if called upon to give evidence thereof, as witnesses, by a court of justice in due course of law, they must refuse, stating the injunctions by which they are restrained. On the other hand, the oath taken by the members of an army general court martial, specifying that they are released from it, *if required to give evidence thereof in a court of justice*, establishes a very important distinction; and might authorize many conjectures, as to the motives which induced the legislature to consider the revealing of the opinion of any particular member at a naval court martial, of more moment and consequence, than at one in the army.

An impressive instance of the mischiefs and inconveniencies that might be produced, were parliament to relax in this particular,

occurred in the case of Admiral Byng. The members of his court martial having complained of the necessity they were under, owing to the strict letter of the law admitting of *no mitigation*, to condemn him to death, it was moved, and debated in the House of Commons,—that a bill should be brought in, to release them from their oath. There was a majority in favour of the measure. When, however, it was referred to the House of Lords, the majority was decidedly against it. This, I believe, is the only instance, since passing the act now in force, in which the question of releasing the members of a naval court martial from the obligation to secrecy imposed on them by their oath, was ever debated.

Notwithstanding that the act of the 22d George II. is silent on the time and mode of pronouncing sentence, at the conclusion of a naval court martial, yet by the eighth article, in the naval printed instructions, the Judge Advocate is directed to draw up in writing the sentence of the court martial, which being approved and signed by all the members, the audience are to be admitted; and, the party accused being present, the Judge Advocate (or the person officiating as

such) is to pronounce the same. This regulation at once relieves the prisoner from the tortures of anxiety and suspense.

In the army, on the contrary, the members of the court martial being sworn (as the oath before inserted testifies) the prisoner may be long held in doubt as to the judgment denounced against him. This distinction plainly implies that the members of naval courts martial have a more enlarged authority, by giving an immediate sentence, without reference to higher powers, than is vested in the army. Of this military officers are fully sensible. They cannot but reflect, that they are the only subjects in the British empire, composing courts of criminal jurisdiction, whose verdicts are indefinite, and of no avail, unless approved of by superior authority.

In the navy, all judgments of courts martial are read aloud in open court, before the prisoner and audience, all the members present; after which, the court is dissolved.

In the army, no sentence can be known, till approved of by his Majesty, or by an officer legally authorized so to do.

In the navy, no part of the act of the 22d George II. or of the naval instructions, states the right a prisoner may have to a

copy of the sentence, and minutes of the proceedings of the court martial held on him.

But in the army, after a certain specified time, according to the part of the world the court martial is held in, the prisoner has a right to demand a copy of the sentence, and minutes of the court, which are directed to be granted to him, paying reasonably for the same*.

No part of the act (in which are the naval articles of war) directs that any officer or seaman in the fleet, who has been guilty of crimes, offences, or misdemeanours punishable at common law, shall be delivered up to the civil power, on requisition from the magistrates. Nevertheless, it is well understood, that naval officers are not to secrete or screen any person belonging to the fleet, when a proper warrant by legal authority is granted to apprehend an offender, for crimes or misdemeanours committed on shore in any part of his Majesty's dominions; and that naval officers are not to impede, but be assisting, and aid, to the utmost of their power, the officers of justice in the execution of their duty, should they meet with re-

* Ninth article of the Act for punishing Mutiny and Desertion.

sistance on board a ship from the seamen. The act is also silent in regard to arrest for debts contracted by seamen on shore: but, by the 31st George II. chap. 10, they cannot be taken out of the ship, except for crimes, or debts of £20. at least.

In the army articles of war (section 11th article 1st) all commanding officers are directed to be aiding and assisting the officers of justice in apprehending and securing any soldier who has been guilty of any offence against the persons, or property of the subject, punishable by the known laws of the land; and if any officer wilfully neglects or refuses, upon application from the proper officers, to deliver such accused person to the civil magistrate, or to be aiding and assisting the officers of justice in apprehending such person or persons, such officer so offending, upon being convicted before a general court martial, shall be cashiered. By the 2d article of the same 11th section, no officer shall protect any person from his creditors, on the pretence of his being a soldier; and if any officer is convicted thereof, before a general court martial, he shall be cashiered. The debt must be for £20. or upwards, otherwise a soldier is not liable to be arrested*.

* Sixty-fifth article in the Mutiny Bill.

In the navy, when five officers of the rank of post-captains are not in port, then masters and commanders (who rank with majors in the army) are entitled to sit on courts martial—but the number cannot exceed two.

But in the army, captains (who rank with lieutenants in the navy) and also lieutenants, are permitted to compose, and sit as members on, general courts martial.

The discretionary power of courts martial in the land service, is guided by the direction of the crown, and has, with regard to military offences, an almost absolute legislative efficiency. “His Majesty (says the act) may form articles of war, and constitute courts martial with power to try any crime by such articles, and inflict such penalties as the articles direct.”—Vast, and momentous trust! an unlimited power to *create* crimes, and annex to them any punishment, not extending to life or limb! This, indeed, is forbidden to be inflicted, except for crimes declared to be so punishable by this act.

In the navy, no articles can be formed, nor any punishment inflicted, other than as set forth in the act of 22d George II. chap. 33.; therefore all offences, committed in the navy, are punishable by act of

parliament. Notwithstanding, many penalties are subject to be inflicted at the discretion of the court martial ; but they are not (as the articles of war, in the land service,) to be framed, from time to time, at the pleasure of the crown.

Whence this distinction arose, or why the executive power, which is limited so properly with regard to the navy, should be so extensive in respect to the army, it is difficult to assign an adequate reason. The learned Blackstone*, in his Commentaries, supposes it to proceed—"from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient, and the temporary duration of the army, which subsists only from year to year, and might therefore, with less danger, be subjected to discretionary government. But, whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year, has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution ; with this singular fortunate circumstance, that any branch of the legislature may annually put an end

* Comm. vol. i. chap. 13. page 420.

to its *legal existence*, by refusing to concur in its continuance."

I have now stated the most remarkable points, concerning which the laws relative to both services differ in the administration of justice.

Law martial certainly has become part of the *lex terræ*, or law of the land. The naval law is particularly so, forming a permanent act, which does not cease and determine at any stated period, and as such differing from the bill for punishing mutiny and desertion in the army, which, from the jealousy of the British constitution in sanctioning an established military force or standing army within the kingdom, is permitted to exist for a year only, and is obliged to be annually renewed before the time of its expiration.

As, however this act has been annually passed, with very little interruption, since the revolution, this concurrence is a satisfactory indication of its great utility ; and it may be therefore regarded as a permanent act.

Much of the repugnance that has existed against trial by martial law, is founded on the idea that such courts are contrary to the spirit of *magna charta*, and deprive the subject of the privilege of being tried by a jury of his peers, that grand palladium of British

liberty. It will be my endeavour to shew, that this opinion is adopted without due consideration. The court (who are jurors, as well as judges,) is composed of officers amenable to the same laws, and liable to be tried for the same offences, as the person who is brought before their tribunal. As far as the objections may be supposed to apply to the members of superior rank, when an inferior person is tried, and whose cause is on that account thought not to be submitted to his *peers*, or *equals*, it is far from being of the consequence that has been imagined. I do not conceive that, on a trial at common law, a prisoner would object to a juror, merely because he occupied a higher station in life than himself. At naval courts martial, sometimes officers of superior rank are tried by their inferiors; Admirals, for example, partly by captains: yet no hardship or indignity is attributed to this practice.

A greater length of time is allotted for trial by a court martial, than in a court of common law; and all the evidence is frequently read over in open court. Neither is the decision required to be *unanimous*; but upon mature deliberation, by the majority, who have a right to inspect, and to have read over to them, as often as they judge re-

quisite, any part of the minutes of the proceedings taken by the Judge Advocate ; and when necessary, the court adjourns from day to day. The members are thus enabled to state and arrange the evidence, as it is clearly laid before them : nor are they exposed to that powerful delusion, through which experienced advocates frequently influence the minds of a jury, by specious appeals to the passions and prejudices of their auditors.

Circumstanced as are common juries,—compelled to give their opinions before they separate, eat or drink (unless in extraordinary cases) and to be unanimous in their verdict,—the best and most intelligent men may sometimes return a verdict, which, upon cool deliberation, they would wish to reverse*. Perhaps, necessitated speedily to resume their several occupations in civil life, jurors, so situated, may too hastily decide on the merits or demerits of the subject legally submitted to their consideration. But this plea, however improper, cannot influence the conduct of an officer, who is freed from every other kind of duty whilst employed as a member of a court martial ; and since sen-

* Blackstone's Comm. b. iii. p. 390.

tence is finally adjudged by a majority, an obstinate or inequitable person has no chance of in some measure compelling the rest of the members to adopt his opinion, and thereby accomplish his views.

It is not my wish, by these strictures, to invalidate the trial by jury, that glorious bulwark of our freedom. I am solicitous only to shew that courts martial, as far as the nature of the case will admit, fall not so short of the advantages attending the trial by jury on shore, as might at first be imagined. Let it also be recollected, that the members of this tribunal, possessing the advantages of education and rank, may be considered in the light of a special jury.

I have now concluded, according to the plan I had proposed, a Treatise on Naval Courts Martial. Far from presuming that my labours have reflected any new light on the subjects which I have discussed, far from imagining that they can impart any extraordinary information to intelligent and experienced naval characters, it is my principal hope, that this work may afford some assistance to officers, when their attention, otherwise engaged in the execution of important military expeditions, is necessarily diverted from their duty, by the exercise of their

judicial functions. It is at such moments, that I flatter myself the present Treatise will be found essentially serviceable.

The junior commanders in the navy will, I trust, find their enquiries considerably facilitated by an attentive perusal of the preceding pages. Having the principles and practice of courts martial comprised in a single volume, it will serve as a guide for their conduct, and they will be enabled to form an opinion on cases judicially submitted to their judgment, without erroneously depending on information superficially collected from each other, or upon precedents, however frequently referred to, whose only authority consists in their being hitherto undisputed. That work cannot be altogether uninteresting, in which objects of legal moment are brought to their just criterion, the standard of the law, by which only our conduct ought in such cases to be regulated, and to which all opinions must submit.

FINIS.

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THIS

APPENDIX.

*An Act, passed in the 22d Year of the Reign of George
the Second, intituled,*

AN ACT

For amending, explaining, and reducing into
One Act of Parliament, the Laws relating
to the Government of His Majesty's Ships,
Vessels, and Forces by Sea.

ALSO,

An ACT made in 19 Geo. III. to explain and
amend the said Act.

ANNO VICESIMO SECUNDO

GEORGII II. Regis.

An Act for amending, explaining, and reducing into One Act of Parliament, the Laws relating to the Government of His Majesty's Ships, Vessels, and Forces by Sea.

SECT. 1. **W**HEREAS the several Laws relating to the Sea Service, made at different Times, and on different Occasions, have been found by Experience not to be so full, so clear, so expedient, or so consistent with each other, as they ought to be ; for amending and explaining the said Laws, and for reducing them into One uniform Act of Parliament, be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, an Act passed in the Thirteenth Year of the Reign of King Charles the Second, intituled, "An Act for establishing Articles and Orders for the regulating and better Government of His Majesty's Navies, Ships of War, and Forces by

Preamble.

Act 13Car. 11.

and Part of
Act 2 Will. &
Mary.

Sea ;” and also so much of an Act passed in the Second Year of the Reign of King William and Queen Mary, intituled, “ An Act concerning the Commissioners of the Admiralty ;” as directs the Form of an Oath to be taken by every Officer present, upon all Trials of Offenders by Courts Martial to be held by virtue of any Commission to be granted by the Lord High Admiral, or the Commissioners for executing the Office of Lord High Admiral ; and also so much of an Act passed in the Sixth Year of the Reign of King George the First,

and Part of
Act 6 Geo. I.

intituled, “ An Act for making perpetual so much of an Act made in the Tenth Year of the Reign of Queen Anne, for the reviving and continuing several Acts of Parliament therein mentioned, as relates to the building and repairing County Gaols ; and also an Act of the Eleventh and Twelfth Years of the Reign of King William the Third, for the more effectual Suppression of Piracy ; and for making more effectual the Act of the Thirteenth Year of the Reign of King Charles the Second, intituled, ‘ An Act for establishing Articles and Orders for the regulating and better Government of His Majesty’s Navies, Ships of War, and Forces by Sea’ ;” as relates to the Trial and Punishment of Persons who shall commit any of the Crimes or Offences mentioned in the said Articles, upon the Shore, in any Foreign Part or Parts ; and also so much of an Act passed in the Eighth Year of the Reign of

and Part of
Act 8 Geo. I.

King George the First, intituled, “An Act for the more effectual suppressing of Piracy,” as directs the Punishment to be inflicted by a Court Martial upon any Captain, Commander, or other Officer of any of His Majesty’s Ships or Vessels of War, who shall receive on Board, or permit to be received on Board, any Goods or Merchandizes whatsoever, in order to trade or merchandize with the same, (except the Goods and Merchandizes therein excepted); and also an Act passed in the Eighteenth Year of the Reign of His present Majesty, intituled, “An Act for the regulating and better Government of His Majesty’s Navies, Ships of War, and Forces by Sea; and for regulating the Proceedings upon Courts Martial in the Sea Service;” and also an Act passed in the Twenty-first Year of the Reign of His present Majesty, intituled, “An Act for further regulating the Proceedings upon Courts Martial in the Sea Service; and for extending the Discipline of the Navy to the Crew of His Majesty’s Ships wrecked, lost, or taken; and for continuing to them their Wages upon certain Conditions; shall be, and the same are hereby repealed to all Intents and Purposes whatsoever.

And Act
18 Geo. II.

and Act
21 Geo. II.
repealed.

SECT. 2. And, for the regulating and better Government of His Majesty’s Navies, Ships of War, and Forces by Sea, whereon, under the good Providence of God, the Wealth, Safety,

Commence-
ment of the
Articles.

and Strength of the Kingdom chiefly depend ; be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That, from and after the Twenty-fifth Day of December One thousand seven hundred and forty-nine, the Articles and Orders hereinafter following, as well in Time of Peace as in Time of War, shall be duly observed and put in Execution, in Manner hereinafter mentioned.

Public Wor-
ship to be
performed.

I. All Commanders, Captains, and Officers, in or belonging to any of His Majesty's Ships or Vessels of War, shall cause the public Worship of Almighty God, according to the Liturgy of the Church of England established by Law, to be solemnly, orderly, and reverently performed in their respective Ships ; and shall take Care that Prayers and Preaching, by the Chaplains in Holy Orders of the respective Ships, be performed diligently ; and that the Lord's Day be observed according to Law.

Penalty of
Profane
Swearing, and
other Immo-
ralities.

II. All Flag Officers, and all Persons in or belonging to His Majesty's Ships or Vessels of War, being guilty of profane Oaths, Cursings, Execrations, Drunkenness, Unclean-ness, or other scandalous Actions, in Deroga- tion of God's Honour, and Corruption of good Manners, shall incur such Punishment as a

Court Martial shall think fit to impose, and as the Nature and Degree of their Offence shall deserve.

III. If any Officer, Mariner, Soldier, or other Person of the Fleet, shall give, hold, or entertain Intelligence to or with any Enemy or Rebel, without Leave from the King's Majesty, or the Lord High Admiral, or the Commissioners for executing the Office of Lord High Admiral, Commander in Chief, or his Commanding Officer, every such Person so offending, and being thereof convicted by the Sentence of a Court Martial, shall be punished with Death.

Penalty of holding illegal Correspondence with an Enemy.

IV. If any Letter or Message from any Enemy or Rebel be conveyed to any Officer, Mariner, or Soldier, or other in the Fleet, and the said Officer, Mariner, Soldier, or other as aforesaid, shall not, within Twelve Hours, having Opportunity so to do, acquaint his superior Officer, or the Officer commanding in Chief, with it ; or if any superior Officer being acquainted therewith, shall not in convenient Time reveal the same to the Commander in Chief of the Squadron, every such Person so offending, and being convicted thereof, by the Sentence of the Court Martial, shall be punished with Death, or such other Punishment as the Nature and Degree of Offence shall deserve, and the Court Martial shall impose.

Penalty of not acquainting the superior Officer with any Letter or Message sent from an Enemy.

Penalty of
Persons being
found to be
Spies, and of
delivering se-
ducing Letters,
&c. from an
Enemy.

V. All Spies, and all Persons whatsoever who shall come, or be found, in the Nature of Spies, to bring or deliver any seducing Letters or Messages from any Enemy or Rebel, or endeavour to corrupt any Captain, Officer, Mariner, or other in the Fleet, to betray his Trust, being convicted of any such Offence, by the Sentence of the Court Martial, shall be punished with Death, or such other Punishment as the Nature and Degree of the Offence shall deserve, and the Court Martial shall impose.

Penalty of re-
lieving an
Enemy.

VI. No Person in the Fleet shall relieve an Enemy or Rebel with Money, Victuals, Powder, Shot, Arms, Ammunition, or any other Supplies whatsoever, directly or indirectly, upon Pain of Death, or such other Punishment as the Court Martial shall think fit to impose, and as the Nature and Degree of the Crime shall deserve.

Penalty of
not sending
to the Court
of Admiralty
all Papers
found aboard
Prize Ships.

VII. All the Papers, Charter Parties, Bills of Lading, Passports, and other Writings whatsoever, that shall be taken, seized, or found aboard any Ship or Ships which shall be surprized or taken as Prize, shall be duly preserved, and the very Originals shall, by the Commanding Officer of the Ship which shall take such Prize, be sent intirely, and without Fraud, to the Court of Admiralty, or such other Court or Commissioners as shall be authorized to determine whether such Prize be lawful

Capture, there to be viewed, made use of, and proceeded upon according to Law ; upon pain that every Person offending herein shall forfeit and lose his Share of the Capture, and shall suffer such further Punishment as the Nature and Degree of his Offence shall be found to deserve, and the Court Martial shall impose.

VIII. No Person in or belonging to the Fleet shall take out of any Prize, or Ship seized for Prize, any Money, Plate, or Goods, unless it shall be necessary for the better securing thereof, or for the necessary Use and Service of any of His Majesty's Ships or Vessels of War, before the same be adjudged lawful Prize in some Admiralty Court ; but the full and entire Account of the Whole, without Imbezzlement, shall be brought in, and Judgment passed intirely upon the Whole without Fraud, upon pain that every Person offending herein shall forfeit and lose his Share of the Capture, and suffer such further Punishment as shall be imposed by a Court Martial, or such Court of Admiralty, according to the Nature and Degree of the Offence.

Penalty of taking Money or other Effects out of any Prize before the same shall be condemned.

IX. If any Ship or Vessel shall be taken as Prize, none of the Officers, Mariners, or other Persons on board her, shall be stripped of their Clothes, or in any Sort pillaged, beaten, or evil-intreated, upon pain that the Person or Persons so offending shall be liable to such

Penalty of stripping, or ill-using Persons taken on Board a Prize.

Punishment as a Court Martial shall think fit to inflict.

Penalty of not preparing for Fight, and encouraging the Men in Time of Action.

X. Every Flag Officer, Captain, and Commander in the Fleet, who, upon Signal or Order of Fight, or Sight of any Ship or Ships which it may be his Duty to engage, or who, upon Likelihood of Engagement, shall not make the necessary Preparations for Fight, and shall not in his own Person, and according to his Place, encourage the inferior Officers and Men to fight courageously, shall suffer Death, or such other Punishment as from the Nature and Degree of the Offence a Court Martial shall deem him to deserve; and if any Person in the Fleet shall treacherously or cowardly yield or cry for Quarter, every Person so offending and being convicted thereof by the Sentence of a Court Martial, shall suffer Death.

Penalty of disobeying the Orders of the Commanding Officer in Time of Action, &c.

XI. Every Person in the Fleet, who shall not duly observe the Orders of the Admiral, Flag Officer, Commander of any Squadron or Division, or other his superior Officer, for assailing, joining Battle with, or making Defence against any Fleet, Squadron, or Ship; or shall not obey the Orders of his superior Officer as aforesaid in Time of Action, to the best of his Power; or shall not use all possible Endeavours to put the same effectually in Execution; every such Person so offending,

and being convicted thereof by the Sentence of the Court Martial, shall suffer Death, or such other Punishment as from the Nature and Degree of the Offence a Court Martial shall deem him to deserve.

* XII. Every Person in the Fleet, who through Cowardice, Negligence, or Disaffection, shall in Time of Action withdraw or keep back, or not come into the Fight or Engagement; or shall not do his utmost to take or destroy every Ship which it shall be his Duty to engage; and to assist and relieve all and every of His Majesty's Ships, or those of His Allies, which it shall be his Duty to assist and relieve; every such Person so offending, and being convicted thereof by the Sentence of a Court Martial, shall suffer Death

Penalty of Cowardice, or other Neglect of Duty in Time of Action.

* XIII. Every Person in the Fleet, who through Cowardice, Negligence, or Disaffection, shall forbear to pursue the Chace of any Enemy, Pirate, or Rebel, beaten or flying; or shall not relieve and assist a known Friend in view to the utmost of his Power; being convicted of any such Offence by the Sentence of a Court Martial, shall suffer Death.

Penalty of not pursuing the Enemy, and of not assisting a Friend in View.

XIV. If, when Action, or any Service shall be commanded, any Person in the Fleet shall

Penalty of delaying or discouraging the Service, on Account of

* Twelfth and thirteenth Articles, part repealed by 19 George III.

Arrears of
Wages, or
other Pre-
tence.

presume to delay or discourage the said Action or Service, upon Pretence of Arrears of Wages, or upon any Pretence whatsoever; every Person so offending, being convicted thereof by the Sentence of the Court Martial, shall suffer Death, or such other Punishment as from the Nature and Degree of the Offence a Court Martial shall deem him to deserve.

Penalty of
deserting to
the Enemy,
or running
away with
any Ship of
War, or Stores.

XV. Every Person in or belonging to the Fleet, who shall desert to the Enemy, Pirate, or Rebel, or run away with any of His Majesty's Ships or Vessels of War, or any Ordnance, Ammunition, Stores, or Provision belonging thereto, to the weakening of the Service, or yield up the same cowardly or treacherously to the Enemy, Pirate, or Rebel, being convicted of any such Offence by the Sentence of the Court Martial shall suffer Death.

Penalty of de-
serting, or in-
ticing others
so to do;

or entertain-
ing a Deserter,
without giving
Notice to the
Captain to
whose Vessel
he belongs.

XVI. Every Person, in or belonging to the Fleet, who shall desert, or entice others so to do, shall suffer Death, or such other Punishment as the Circumstances of the Offence shall deserve, and a Court Martial shall judge fit: And if any Commanding Officer of any of His Majesty's Ships or Vessels of War shall receive or entertain a Deserter from any other of His Majesty's Ships or Vessels, after discovering him to be such Deserter, and shall not with all convenient Speed give Notice to the Captain of the Ship or Vessel to which such Deserter

belongs ; or, if the said Ships or Vessels are at any considerable Distance from each other, to the Secretary of the Admiralty, or to the Commander in Chief ; every Person so offending, and being convicted thereof by the Sentence of the Court Martial, shall be cashiered.

XVII. The Officers and Seamen of all Ships appointed for Convoy and Guard of Merchant Ships, or of any other, shall diligently attend upon that Charge, without Delay, according to their Instructions in that Behalf ; and whosoever shall be faulty therein, and shall not faithfully perform their Duty, and defend the Ships and Goods in their Convoy, without either diverting to other Parts or Occasions, or refusing or neglecting to fight in their Defence, if they be assailed, or running away cowardly, and submitting the Ships in their Convoy to Peril and Hazard ; or shall demand or exact any Money or other Reward from any Merchant or Master for convoying of any Ships or Vessels intrusted to their Care, or shall misuse the Masters or Mariners thereof, shall be condemned to make Reparation of the Damage to the Merchants, Owners, and others, as the Court of Admiralty shall adjudge ; and also be punished criminally, according to the Quality of their Offences, be it by Pains of Death, or other Punishment, according as shall be adjudged fit by the Court Martial.

Penalty of not
taking Care of
and defend-
ing Ships
under Convoy.

Penalty of
taking any
Goods on
board, other
than for the
Use of the
Vessel, except
Gold, Silver,
Jewels, &c.

XVIII. If any Captain, Commander, or other Officer of any of His Majesty's Ships or Vessels, shall receive on board, or permit to be received on board such Ship or Vessel, any Goods or Merchandizes whatsoever, other than for the sole Use of the Ship or Vessel, except Gold, Silver, or Jewels, and except the Goods and Merchandizes belonging to any Merchant, or other Ship or Vessel which may be shipwrecked, or in imminent Danger of being shipwrecked either on the High Seas, or in any Port, Creek, or Harbour, in order to the preserving them for their proper Owners, and except such Goods or Merchandizes as he shall at any Time be ordered to take or receive on board by Order of the Lord High Admiral of Great Britain, or the Commissioners for executing the Office of Lord High Admiral for the Time being; every Person so offending, being convicted thereof by the Sentence of the Court Martial, shall be cashiered, and be for ever afterwards rendered incapable to serve in any Place or Office in the Naval Service of His Majesty, His Heirs and Successors.

Penalty of
making muti-
nous Assem-
blies,

or uttering
seditious
Words.

XIX. If any Person in or belonging to the Fleet, shall make, or endeavour to make, any mutinous Assembly upon any Pretence whatsoever, every Person offending herein, and being convicted thereof by the Sentence of the Court Martial, shall suffer Death: And if any Person in or belonging to the Fleet shall utter

any Words of Sedition or Mutiny, he shall suffer Death, or such other Punishment as a Court Martial shall deem him to deserve : And if any Officer, Mariner, or Soldier, in or belonging to the Fleet, shall behave himself with Contempt to his superior Officer, such superior Officer being in the Execution of his Office, he shall be punished according to the Nature of his Offence by the Judgment of a Court Martial.

XX. If any Person in the Fleet shall conceal any traitorous or mutinous Practice or Design, being convicted thereof by the Sentence of a Court Martial, he shall suffer Death, or such other Punishment as a Court Martial shall think fit ; and if any Person, in or belonging to the Fleet, shall conceal any traitorous or mutinous Words spoken by any, to the Prejudice of His Majesty or Government, or any Words, Practice, or Design, tending to the Hindrance of the Service, and shall not forthwith reveal the same to the Commanding Officer, or being present at any Mutiny or Sedition, shall not use his utmost Endeavours to suppress the same, he shall be punished as a Court Martial shall think he deserves.

Penalty of concealing any traitorous or mutinous Practice, Design,

or Words.

XXI. If any Person in the Fleet shall find Cause of Complaint of the Unwholesomeness of the Victual, or upon other just Ground, he shall quietly make the same known to his Su-

Penalty of endeavouring to stir up any Disturbance on Account of the Unwholesomeness of Victual, or other just Ground.

perior, or Captain, or Commander in Chief, as the Occasion may deserve, that such present Remedy may be had as the Matter may require ; and the said Superior, Captain, or Commander in Chief, shall, as far as he is able, cause the same to be presently remedied ; and no Person in the Fleet, upon any such or other Pretence, shall attempt to stir up any Disturbance, upon Pain of such Punishment as a Court Martial shall think fit to inflict, according to the Degree of the Offence.

Penalty of
striking, &c: a
superior
Officer,

or of quarrel-
ling with, or
disobeying
his lawful
Commands in
the Execution
of his Office.

XXII. If any Officer, Mariner, Soldier, or other Person in the Fleet, shall strike any of his superior Officers, or draw, or offer to draw, or lift up any Weapon against him, being in the Execution of his Office, on any Pretence whatsoever, every such Person being convicted of any such Offence, by the Sentence of a Court Martial, shall suffer Death ; and if any Officer, Mariner, Soldier, or other Person in the Fleet, shall presume to quarrel with any of his superior Officers, being in the Execution of his Office, or shall disobey any lawful Command of any of his superior Officers ; every such Person being convicted of any such Offence, by the Sentence of a Court Martial, shall suffer Death, or such other Punishment as shall, according to the Nature and Degree of his Offence, be inflicted upon him by the Sentence of a Court Martial.

XXIII. If any Person in the Fleet shall quarrel or fight with any other Person in the Fleet, or use reproachful or provoking Speeches or Gestures, tending to make any Quarrel or Disturbance, he shall, upon being convicted thereof, suffer such Punishment as the Offence shall deserve, and a Court Martial shall impose.

Penalty of quarrelling, &c. or using reproachful Speech or Gestures.

XXIV. There shall be no wasteful Expence of any Powder, Shot, Ammunition, or other Stores in the Fleet, nor any Embezzlement thereof; but the Stores and Provisions shall be carefully preserved, upon Pain of such Punishment to be inflicted upon the Offenders, Abettors, Buyers, and Receivers, (being Persons subject to Naval Discipline,) as shall be by a Court Martial found just in that Behalf.

Penalty of wasting or embezzling the Stores, &c.

XXV. Every Person in the Fleet, who shall unlawfully burn or set fire to any Magazine or Store of Powder, or Ship, Boat, Ketch, Hoy, or Vessel, or Tackle or Furniture thereunto belonging, not then appertaining to any Enemy, Pirate, or Rebel, being convicted of any such Offence, by the Sentence of a Court Martial, shall suffer Death.

Penalty of burning any Magazine or Vessel, &c. not belonging to an Enemy.

XXVI. Care shall be taken in the conducting and steering of any of His Majesty's Ships, that through Wilfulness, Negligence, or other Defaults, no Ship be stranded, or run upon

Penalty of Neglect in the conducting and steering of Ships.

any Rocks or Sands, or split or hazarded upon Pain that such as shall be found guilty therein, be punished by Death, or such other Punishment as the Offence, by a Court Martial shall be judged to deserve.

Penalty of sleeping on Watch, and forsaking his Station.

XXVII. No Person in or belonging to the Fleet shall sleep upon his Watch, or negligently perform the Duty imposed on him, or forsake his Station, upon Pain of Death, or such other Punishment as a Court Martial shall think fit to impose, and as the Circumstances of the Case shall require.

Penalty of committing Murder.

XXVIII. All Murders committed by any Person in the Fleet, shall be punished with Death by the Sentence of a Court Martial.

Penalty of committing Buggery or Sodomy.

XXIX. If any Person in the Fleet shall commit the unnatural and detestable Sin of Buggery or Sodomy with Man or Beast, he shall be punished with Death by the Sentence of a Court Martial.

Penalty of committing Robbery.

XXX. All Robbery committed by any Person in the Fleet, shall be punished with Death, or otherwise, as a Court Martial, upon Consideration of Circumstances, shall find meet.

Penalty of making or signing false Musters;

XXXI. Every Officer, or other Person in the Fleet, who shall knowingly make or sign a false Muster or Muster Book, or who shall

command, counsel, or procure making or signing thereof, or who shall aid or abet any other Person in the making or signing thereof, shall, upon Proof of any such Offence being made before a Court Martial, be cashiered, and rendered incapable of further Employment in His Majesty's Naval Service.

XXXII. No Provost-martial belonging to the Fleet shall refuse to apprehend any Criminal, whom he shall be authorized by legal Warrant to apprehend, or to receive or keep any Prisoner committed to his Charge, or wilfully suffer him to escape being once in his Custody, or dismiss him without lawful Order, upon Pain of such Punishment as a Court Martial shall deem him to deserve; and all Captains, Officers, and others in the Fleet, shall do their Endeavour to detect, apprehend, and bring to Punishment all Offenders, and shall assist the Officers appointed for that Purpose therein, upon Pain of being proceeded against, and punished by a Court Martial, according to the Nature and Degree of the Offence.

XXXIII. If any Flag Officer, Captain, or Commander, or Lieutenant belonging to the Fleet, shall be convicted before a Court Martial of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent Manner, unbecoming the Character of an Officer, he shall be dismissed from His Majesty's Service.

Penalty of not apprehending Prisoners, and permitting them to escape.

Penalty of all scandalous, oppressive, or fraudulent Behaviour of Officers.

Penalty of
Mutiny, De-
sertion, or
Disobedience,
of Persons in
actual Service
and full Pay,
on Shore.

XXXIV. Every Person being in actual Service and full Pay, and Part of the Crew in or belonging to any of His Majesty's Ships or Vessels of War, who shall be guilty of Mutiny, Desertion, or Disobedience to any lawful Command, in any Part of His Majesty's Dominions on Shore, when in actual Service relative to the Fleet, shall be liable to be tried by a Court Martial, and suffer the like Punishment, for every such Offence, as if the same had been committed at Sea on board any of His Majesty's Ships or Vessels of War.

Penalty of
Persons in
actual Service
and full Pay,
committing on
Shore, out of
His Majesty's
Dominions,
any of the
Crimes pu-
nishable by
these Articles.

XXXV. If any Person who shall be in actual Service and full Pay in His Majesty's Ships and Vessels of War, shall commit upon the Shore, in any Place or Places out of His Majesty's Dominions, any of the Crimes punishable by these Articles and Orders, the Persons so offending shall be liable to be tried and punished for the same, in like Manner, to all Intents and Purposes, as if the said Crimes had been committed at Sea, on board any of His Majesty's Ships or Vessels of War.

All other
Crimes not
Capital, &c.
to be punished
according to
the Custom of
the Navy.

XXXVI. All other Crimes not Capital, committed by any Person or Persons in the Fleet, which are not mentioned in this Act, or for which no Punishment is hereby directed to be inflicted, shall be punished according to the Laws and Customs in such Cases used at Sea.

SECT. 3. Provided always, That no Person convicted of any Offence, shall, by the Sentence of any Court Martial to be held by virtue of this Act, be adjudged to be imprisoned for a longer Term than the Space of Two Years.

No Sentence of Imprisonment to be for a longer Term than 2 Years.

SECT. 4. Provided always, That nothing in this Act contained shall extend, or be construed to extend, to empower any Court Martial to be constituted by virtue of this Act, to proceed to the Punishment or Trial of any of the Offences specified in the several Articles contained in this Act, or of any Offences whatsoever (other than the Offences specified in the Fifth, Thirty-fourth, and Thirty-fifth of the foregoing Articles and Orders) which shall not be committed upon the main Sea, or in great Rivers only, beneath the Bridges of the said Rivers nigh to the Sea, or in any Haven, River, or Creek within the Jurisdiction of the Admiralty, and which shall not be committed by such Persons as at the Time of the Offence committed shall be in actual Service and full Pay in the Fleet or Ships of War of His Majesty, His Heirs or Successors, such Persons only excepted, and for such Offences only, as are described in the Fifth of the foregoing Articles and Orders.

Court Martial not to try any Offences,

except those specified in the 5th, 34th, 35th Articles, which shall not be committed within the Jurisdiction of the Admiralty.

SECT. 5. Provided also, That nothing in this Act contained shall extend, or be construed to extend, to empower any Court Martial to be

No Land Officer or Soldier, on Board any Transport Ship, to be

tried for any
of the said
Offences by
a Naval
Court Mar-
tial.

constituted by virtue of this Act, to proceed to the Punishment or Trial of any Land Officer or Soldier on board any Transport Ship, for any of the Offences specified in the several Articles contained in this Act.

The Lords of
the Admiralty
impowered to
grant Commis-
sions to the
Commander
in Chief for
holding Courts
Martial.

SECT. 6. And it is hereby further enacted, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, the Lord High Admiral of Great Britain, or the Commissioners for executing the Office of Lord High Admiral of Great Britain for the Time being, shall have full Power and Authority to grant Commissions to any Officer commanding in Chief any Fleet or Squadron of Ships of War, to call and assemble Courts Martial, consisting of Commanders and Captains; and that in case any Officer commanding in Chief any Fleet or Squadron of Ships of War (who shall be authorized by the Lord High Admiral, or the Commissioners for executing the Office of Lord High Admiral for the Time being, to call and assemble Courts Martial in Foreign Parts) shall happen to die, or be recalled, or removed from his Command, then the Officer upon whom the Command of the said Fleet or Squadron shall devolve, and so from Time to Time the Officer who shall have the Command of the said Fleet or Squadron, shall have the same Power to call and assemble Courts Martial, as the First Commander in Chief of

The Comman-
der in Chief
dying, recall-
ed, or remov-
ed, the next in
Command
impowered to
hold Courts
Martial.

the said Fleet or Squadron was invested with.

SECT. 7. Provided always, and it is hereby enacted and declared, That no Commander in Chief of any Fleet or Squadron of His Majesty's Ships, or Detachment thereof, consisting of more than Five Ships, shall preside at any Court Martial in Foreign Parts, but that the Officer next in Command to such Officer commanding in Chief shall hold such Court Martial, and preside thereat; any Law, Custom, or Usage, to the contrary notwithstanding.

The Officer next in Command to the Commander in Chief, where there are more than Five Ships, to preside at Courts Martial held in Foreign Parts.

SECT. 8. And it is hereby further enacted, That from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, in case any Commander in Chief of any Fleet or Squadron of His Majesty's Ships or Vessels of War in Foreign Parts shall detach any Part of such Fleet or Squadron, every Commander in Chief shall, and he is hereby authorized and required, by Writing under his Hand, to empower the Chief Commander of the Squadron or Detachment so ordered on such separate Service (and in case of his Death or Removal, the Officer to whom the Command of such separate Squadron or Detachment shall belong) to hold Courts Martial, during the Time of such separate Service, or

Commander in Chief to empower the Commanders of a Squadron ordered on separate Service, to hold Courts Martial.

until the Commander of the said Detachment for the Time being shall return to his Commander in Chief, or shall come under the Command of any other his superior Officer, or return to Great Britain or Ireland.

If Five or more Ships shall meet in Foreign Parts, the Senior Officer to hold Courts Martial, and preside thereat.

SECT. 9. Provided always, and it is hereby further enacted, That if any Five or more of His Majesty's Ships or Vessels of War shall happen to meet together in Foreign Parts, then, and in such Case, it shall be lawful for the Senior Officer of the said Ships or Vessels to hold Courts Martial, and preside thereat, from Time to Time as there shall be Occasion, during so long Time as the said Ships or Vessels of War, or any Five or more of them, shall continue together.

Where it shall be improper for the Person next in Command to the Senior Officer to hold Courts Martial in Foreign Parts, the Third Officer in Command to preside.

SECT. 10. Provided nevertheless, and be it also enacted, That where any material Objection occurs, which may render it improper for the Person who is next in Command to the Senior Officer or Commander in Chief of any Fleet or Squadron of His Majesty's Ships of War in Foreign Parts to hold Courts Martial, or preside thereat, in such Case it shall be lawful for the Lord High Admiral, or Commissioners for executing the Office of Lord High Admiral for the Time being, as also the Commander in Chief of any such Fleet or Squadron of His Majesty's Ships in Foreign Parts

respectively, to appoint the Third Officer in Command to preside at, or hold such Court Martial.

SECT. 11. And it is hereby further enacted, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, it shall be lawful for the Lord High Admiral of Great Britain, or the Commissioners for executing the Office of Lord High Admiral for the Time being, and they are hereby respectively authorized, from Time to Time, as there shall be Occasion, to direct any Flag Officer, or Captain of any of His Majesty's Ships of War, who shall be in any Port of Great Britain or Ireland, to hold Courts Martial in any such Port, provided such Flag Officer or Captain be the First, Second, or Third in Command in such Port, as shall be found most expedient, and for the Good of His Majesty's Service; and such Flag Officer or Captain, so directed to hold Courts Martial, shall preside at such Court Martial; any Thing herein contained to the contrary notwithstanding.

The Lords of the Admiralty empowered to appoint Officers in the Ports of Great Britain or Ireland to hold Courts Martial.

SECT. 12. And it is hereby further enacted, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, no Court Martial, to be held or appointed by virtue of this present Act, shall consist of more than Thirteen, or of less than Five Persons, to be composed of such Flag Officers,

A Court Martial not to consist of more than 13, nor less than Five Officers.

Captains, or Commanders then and there present, as are next in Seniority to the Officer who presides at the Court Martial.

The Lords of the Admiralty or Officer appointed to hold Courts Martial, not to direct the particular Number of Persons of which the Court is to consist.

SECT. 13. Provided always, and be it enacted by the Authority aforesaid, That nothing herein contained shall extend, or be construed to extend, to authorize and empower the Lord High Admiral, or the Commissioners for executing the Office of Lord High Admiral, or any Officer empowered to order or hold Courts Martial, to direct or ascertain the particular Number of Persons of which any Court Martial, to be held or appointed by virtue of this present Act, shall consist.

Where there are but Three of the Rank of Post Captains, the President is to call in as many Commanders under that Rank as will make Five in the Whole, to hold the Court Martial.

SECT. 14. Provided always, and it is hereby enacted and declared, That in case any Court Martial shall, by virtue of this Act, be appointed to be held at any Place where there are not less than Three nor yet so many as Five Officers of the Degree and Denomination of a Post Captain, or of a superior Rank, to be found, then it shall be lawful for the Officer, at the Place appointed for holding such Court Martial, who is to preside at the same, to call to his Assistance as many of the Commanders of His Majesty's Vessels, under the Rank and Degree of a Post Captain, as together with the Post Captains then and there present, will make up the Number of Five, to hold such Court Martial.

SECT. 15. And it is hereby further enacted, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, no Member of any Court Martial, after the Trial is begun, shall go on Shore till Sentence be given, but remain on board the Ship in which the Court shall first assemble, except in * case of Sickness, to be judged of by the Court, upon Pain of being cashiered from His Majesty's Service; nor shall the Proceedings of the said Court be delayed by the Absence of any of its Members, provided a sufficient Number doth remain to compose the said Court, which shall and is hereby required to sit from Day to Day (Sunday always excepted) until the Sentence be given.

Penalty if a Member of the Court go on Shore, after Trial is begun, till Sentence be given.

Proceedings not to be delayed, if there is a sufficient Number to compose the Court.

SECT. 16. And it is hereby further enacted, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, upon all Trials of Offenders by any Court Martial, all the Officers present, who are to constitute the said Court Martial, shall, before they proceed to such Trial, take such Oath as is hereinafter mentioned, upon the Holy Evangelists, before the Court; which Oath the Judge Advocate, or his Deputy, or the Person appointed to officiate as such, is hereby authorized and required to administer in the Words following; (that is to say):

Officers composing a Court Martial to be sworn.

* Altered by 19th Geo: III.

The Oath.

“ I, *A. B.* do swear, That I will duly admi-
 “ nister Justice, according to the Articles
 “ and Orders established by an Act passed
 “ in the Twenty-second Year of the Reign
 “ of His Majesty King George the Se-
 “ cond, for amending, explaining, and
 “ reducing into One Act of Parliament,
 “ the Laws relating to the Government
 “ of His Majesty’s Ships, Vessels, and
 “ Forces by Sea, without Partiality, Fa-
 “ vour, or Affection; and if any Case
 “ shall arise, which is not particularly men-
 “ tioned in the said Articles and Orders,
 “ I will duly administer Justice accord-
 “ ing to my Conscience, to the best of my
 “ Understanding, and the Custom of the
 “ Navy in the like Cases; and I do fur-
 “ ther swear, That I will not upon any
 “ Account, at any Time whatsoever, dis-
 “ close or discover the Vote or Opinion
 “ of any particular Member of the Court
 “ Martial, unless thereunto required by
 “ Act of Parliament.

“ So help me GOD.”

Judge Advo-
 cate to be
 sworn.

And so soon as the said Oath shall have been
 administered to the respective Members, the
 President of the Court is hereby authorized
 and required to administer to the Judge Ad-
 vocate, or the Person officiating as such, an
 Oath in the following Words :

“ I, A. B. do swear, That I will not upon
 “ any Account, at any Time whatsoever,
 “ disclose or discover the Vote or Opi-
 “ nion of any particular Member of this
 “ Court Martial, unless thereunto required
 “ by Act of Parliament.

“ So help me GOD.”

SECT. 17. And it is hereby further enacted, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, in case any Person in the Fleet, being called upon to give Evidence at any Court Martial, shall refuse to give his Evidence upon Oath, or shall prevaricate in his Evidence, or behave with Contempt to the Court, it shall and may be lawful for such Court Martial to punish every such Offender by Imprisonment, at the Discretion of the Court, such Imprisonment not to continue longer than Three Months, in case of such Refusal or Prevarication, nor longer than One Month in the Case of such Contempt ; and that all and every Person and Persons who shall commit any wilful Perjury, in any Evidence or Examination, upon Oath, at any such Court Martial, or who shall corruptly procure or suborn any Person to commit such wilful Perjury, shall and may be prosecuted in His Majesty's Court of King's Bench by Indictment or Information ; and every Issue joined in any such Indictment or Information shall be tried by good and

Penalty of re-
fusing to give
Evidence, or
of prevaricat-
ing, and of be-
having with
Contempt to
the Court ;

or of Perjury,
Subornation
of Perjury.

lawful Men of the County of Middlesex, or such other County as the said Court of King's Bench shall direct; and all and every Person and Persons being lawfully convicted upon any such Indictment or Information, shall be punished with such Pains and Penalties as are inflicted for the like Offences respectively by Two Acts of Parliament, the One made in the Fifth Year of the Reign of Queen Elizabeth, intituled, "An Act for Punishment of such Persons as shall procure or commit any wilful Perjury;" and the other made in the Second Year of the

Act 5 Eliz.

Act 2 Geo. II.

SECT. 18. And be it further enacted by the Authority aforesaid, That in every Information or Indictment to be prosecuted by virtue of this Act for any such Offence, it shall be sufficient to set forth the Offence charged upon the Defendant, without setting forth the Commission or Authority for holding the Court Martial, and without setting forth the particular Matter tried or to be tried, or directed or intended to be tried, before such Court.

The Offence only to be set forth in any Information, &c.

SECT. 19. And it is hereby further enacted, That, from and after the Twenty-fifth Day of

Report to be made to the Lords of the Admiralty,

December, One thousand seven hundred and forty-nine, no Sentence of Death given by any Court Martial held within the Narrow Seas (*except in Cases of Mutiny*) shall be put in Execution till after the Report of the Proceedings of the said Court shall have been made to the Lord High Admiral, or the Commissioners for executing the Office of Lord High Admiral, and his or their Directions shall have been given therein ; and if the said Court shall have been held beyond the Narrow Seas, then such Sentence of Death shall not be carried into Execution but by Order of the Commander of the Fleet or Squadron wherein Sentence was passed ; and in Cases where Sentence of Death shall be passed in any Squadron, detached from any other Fleet or Squadron upon a separate Service, then such Sentence of Death (*except in Cases of Mutiny*) shall not be put in Execution, but by Order of the Commander of the Fleet or Squadron from which such Detachment shall have been made, or of the Lord High Admiral, or Commissioners for executing the Office of Lord High Admiral ; and in Cases where Sentence of Death shall be passed in any Court Martial held by the senior Officer of Five or more of His Majesty's Ships, which shall happen to meet together in Foreign Parts pursuant to the Power hereinbefore given, then such Sentence of Death (*except in Cases of Mutiny*) shall not be carried into Execution

&c. before
Sentence of
Death (except
in Cases of
Mutiny) given
by any Court
Martial, be
executed.

but by Order of the Lord High Admiral, or Commissioners for executing the Office of Lord High Admiral.

Judge Advocate, or his Deputy, empowered to administer an Oath to Witnesses.

SECT. 20. And be it further enacted and declared, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, the Judge Advocate of any Fleet for the Time being, or his Deputy, shall have full Power and Authority, and is hereby required to administer an Oath to any Witness at any Trial by Court Martial: And in the Absence of the Judge Advocate and his Deputy, the Court Martial shall have full Power and Authority to appoint any Person to execute the Office of Judge Advocate.

The Powers given by the Articles, to be in Force with respect to Crews of Ships lost or destroyed.

SECT. 21. And be it further enacted by the authority aforesaid, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, all the Powers given by the several Articles and Orders established by this Act, shall remain and be in full Force with respect to the Crews of such of His Majesty's Ships as shall be wrecked, or be otherwise lost or destroyed; and all the Command, Power, and Authority given to the Officers of the said Ship or Ships, shall remain and be in full Force as effectually as if such Ship or Ships to which they did belong were not so wrecked, lost, or destroyed, until they

shall be regularly discharged from His Majesty's further Service, or removed into some other of His Majesty's Ships of War, or until a Court Martial shall be held, pursuant to the Custom of the Navy in such Cases, to enquire into the Causes of the Loss of the said Ship or Ships: And if upon such Enquiry it shall appear, by the Sentence of the Court Martial, that all or any of the Officers or Seamen of the said Ship or Ships did their utmost to preserve, get off, or recover the said Ship or Ships, and since the Loss thereof have behaved themselves obedient to their superior Officers, according to the Discipline of the Navy, and the said Articles and Orders hereinbefore established, then all the Pay and Wages of the said Officers and Seamen, or of such of them as shall have done their Duty as aforesaid, shall continue and go on, and be paid to the Time of their Discharge or Death; or if they shall be then alive, to the Time of the holding of such Court Martial, or Removal into some other of His Majesty's Ships of War; and every such Officer and Seaman of His Majesty's Ships of War, who, after the Wreck or Loss of his Ship, shall act contrary to the Discipline of the Navy, and the several Articles and Orders hereinbefore established, or any of them, shall be sentenced by the said Court Martial, and punished as if the Ship to which he did belong was not so wrecked, lost, or destroyed.

The Pay of the Officers and Men of such Ships, who have behaved well, reserved to them.

The Pay of the
Officers and
Men taken by
the Enemy,
who have be-
haved well,
reserved to
them.

SECT. 22. And be it further enacted, That, from and after the said Twenty-fifth Day of December, One thousand seven hundred and forty-nine, all the Pay and Wages of such Officers and Seamen of any of His Majesty's Ships as are taken by the Enemy, and upon Enquiry at a Court Martial shall appear by the Sentence of the said Court to have done their utmost to defend the said Ship or Ships, and since the taking thereof, to have behaved themselves obediently to their superior Officers, according to the Discipline of the Navy, and the said Articles and Orders hereinbefore established, shall continue and go on, and be paid, from the Time of their being so taken, to the Time of the holding of such Court Martial, or until they shall be regularly discharged from His Majesty's Service, or removed into some other of His Majesty's Ships of War, or (if they shall die in Captivity, or not live to the Time of the holding of such Court Martial) to the Time of their Death, in such Manner, and not otherwise, as if the said Ship or Ships to which they did belong respectively, was not, or were not, so taken.

No Person, not
flying from
Justice, to be
tried, unless
Complaint in
Writing be
made to the
Lords of the
Admiralty,
&c.

SECT. 23. Provided always, and be it further enacted, That no Person or Persons, not flying from Justice, shall be tried or punished by any Court Martial for any Offence to be committed against this Act, unless the Complaint of such

Offence be made in Writing to the Lord High Admiral, or to the Commissioners for executing the Office of Lord High Admiral for the Time being, or any Commander in Chief of His Majesty's Squadrons of Ships impowered to hold Courts Martial, or unless a Court Martial to try such Offender shall be ordered by the said Lord High Admiral, or the said Commissioners, or the said Commander in Chief, either within Three Years after such Offence shall be committed, or within One Year after the Return of the Ship, or of the Squadron to which such Offender shall belong, into any of the Ports of Great Britain or Ireland, or within One Year after the Return of such Offender into Great Britain or Ireland.

or a Court be
ordered with-
in Three
Years after
the Offence,

or within One
Year after the
Return of the
Ship or Of-
fenders.

SECT. 24. And whereas by the said Act, intituled, "An Act for the more effectual suppressing of Piracy," it is, amongst other Things, enacted in the following Words, That the said Captain, Commander, or other Officer of the said Ship or Vessel of War, and all and every the Owners and Proprietors of such Goods and Merchandizes, put on board such Ship or Vessel of War as aforesaid, shall lose, forfeit and pay the Value of all and every such Goods and Merchandizes, so put on board as aforesaid; One Moiety of such full Value to such Person or Persons as shall make the First Discovery, and give Information of or concerning the said Offence; the other Moiety of

such full Value to and for the Use of Greenwich Hospital ; all which Forfeitures shall and may be sued for and recovered in the High Court of Admiralty : Now, for making the said in Part recited Act more useful and effectual, be it enacted by the Authority aforesaid, That, from and after the Twenty-fifth Day of December, One thousand seven hundred and forty-nine, if any Captain, Commander, or other Officer of any of His Majesty's Ships or Vessels, shall receive on board, or permit or suffer to be received on board such Ship or Vessel, any Goods or Merchandizes, contrary to the true Intent and Meaning of the Eighteenth Article in this Act before mentioned and hereby enacted, every such Captain, Commander, or other Officer, shall, for every such Offence, over and above any Punishment inflicted by this Act, forfeit and pay the Value of all and every such Goods and Merchandizes so received or permitted, or suffered to be received on board as aforesaid, or the Sum of Five hundred Pounds of lawful Money of Great Britain, at the Election of the Informer, or Person who shall sue for the same, so that no more than One of these Penalties or Forfeitures shall be sued for and recovered by virtue of this and the said in Part recited Act, or either of them, against the same Person, for One and the same Offence ; One Moiety of which Penalties or Forfeitures shall be forfeited and paid to the Person who shall inform or sue for

Penalty on
Officers re-
ceiving on
board any
Goods contra-
ry to Article
18 of this Act.

Application of
the Forfeiture,

the same, and the other Moiety thereof to and for the Use of the Royal Hospital at Greenwich; which Forfeiture shall be sued for and recovered by Action of Debt, Bill, Plaint, or Information, in any of His Majesty's Courts of Record at Westminster, or in the High Court of Admiralty, at the Election of the Informer, or Person who shall sue for the same; and the Court shall award such Costs to the Parties as shall be just; and in all Cases where Judgment or Sentence shall be given against any such Offender, the Court, where such Judgment or Sentence shall be given, shall, with all convenient Speed, certify the same to the Lord High Admiral, or to the Commissioners for executing the said Office.

and Method
of Recovery.

The Court to
certify to the
Lords of the
Admiralty the
Judgment.

SECT. 25. Provided always, That nothing in this Act contained shall extend, or be construed to extend, to take away from the Lord High Admiral of Great Britain, or the Commissioners for executing the Office of Lord High Admiral of Great Britain, or any Vice Admiral, or any Judge or Judges of the Admiralty, or his or their Deputy or Deputies, or any other Officers or Ministers of the Admiralty, or any others having or claiming any Admiral Power, Jurisdiction, or Authority within this Realm, or any other the King's Dominions, or from any Person or Court whatsoever, any Power, Right, Jurisdiction, Pre-eminence, or Authority, which he or they, or any of them,

Limitation of
the Powers of
this Act.

lawfully hath, have, or had, or ought to have and enjoy, before the making of this Act, so as the same Person shall not be punished twice for the same Offence.

Repeal of the recited Statutes not to avoid any Prosecutions for Offences committed on or before the 25th of Dec. 1749.

SECT. 26. Provided nevertheless, and be it enacted, That the Repeal of the said before recited Statutes, or any Part thereof, or any Thing herein contained, shall not extend, or be deemed to extend, to discharge or avoid, or prevent any Prosecution or Suit commenced, or at any Time hereafter to be commenced, against any Person or Persons, for any Offence committed on or before the said Twenty-fifth Day of December, One thousand seven hundred and forty-nine, or to be committed against the said Statutes, or any Part or Parts thereof, but that all Persons who have been, or shall, before the said Twenty-fifth Day of December, be guilty of any such Offence, shall and may be prosecuted, sued, condemned, and punished for the same, as well after as before the said Twenty-fifth Day of December, as if the said Statutes had not been repealed *.

* Extended to Lakes and Rivers in North America, by the 29th George II. Chap. 27.

ANNO DECIMO NONO

GEORGII III. Regis.

*An Act to explain and amend an Act, made in the
Twenty-second Year of the Reign of his late
Majesty King George the Second, intituled,
“ An Act for amending, explaining, and re-
“ ducing into One Act of Parliament, the Laws
“ relating to the Government of His Majesty’s
“ Ships, Vessels, and Forces by Sea.”*

WHEREAS by an Act, made in the Twenty-
second Year of the Reign of his late Majesty
King George the Second, intituled, “ An Act
for amending, explaining, and reducing into
One Act of Parliament, the Laws relating to
the Government of His Majesty’s Ships, Ves-
sels, and Forces by Sea ;” it is, among other
Things, enacted, That, from and after the
Twenty-fifth Day of December, One thousand
seven hundred and forty-nine, no Member of
any Court Martial, after the Trial is begun,
shall go on Shore till Sentence be given, but
remain on board the Ship in which the Court
shall first assemble, except in case of Sickness,
to be judged of by the Court, upon Pain of
being cashiered from His Majesty’s Service ;
nor shall the Proceedings of the said Court be

Preamble.

Recital of an
Act 22 Geo. II

delayed by the Absence of any of its Members, provided a sufficient Number doth remain to compose the Court, which shall, and is thereby required to sit from Day to Day (Sunday always excepted) until the Sentence be given: And whereas it hath been found by Experience, that the confining Members of Courts Martial to the Ship in which such Courts Martial shall first assemble, until Sentence be given, hath been attended with great Inconveniencies and Prejudice to the Health of Officers summoned to attend as Members of Courts Martial; and it is highly necessary and expedient that such Inconveniencies should be prevented in future; May it therefore please Your Majesty, that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That so much and such Part of the said recited Act as directs that no Member of any Court Martial, after the Trial is begun, shall go on Shore till Sentence be given, but remain on board the Ship in which the Court shall first assemble, except in case of Sickness, to be judged of by the Court, upon Pain of being cashiered from His Majesty's Service; and that the Proceedings of the said Court shall not be delayed by the Absence of any of its Members, provided a sufficient Number doth remain to compose

Part of the
said Act re-
pealed.

the said Court, which is thereby required to sit from Day to Day (Sunday always excepted) until the Sentence be given, shall be, and the same is hereby repealed and made void, to all Intents and Purposes whatsoever.

Provided always, and be it enacted, That the Proceedings of any Court Martial shall not be delayed by the Absence of any of its Members, provided a sufficient Number doth remain to compose such Court, which shall, and is hereby required to sit from Day to Day (Sunday always excepted) until the Sentence be given; any Thing hereinbefore contained to the contrary thereof in anywise notwithstanding: And no Member of the said Court Martial shall absent himself from the said Court during the whole Course of the Trial, upon Pain of being cashiered from His Majesty's Service, except in case of Sicknes, *or other extraordinary and indispensable Occasion, to be judged of by the said Court.*

Proceedings of Courts Martial not to be delayed by the Absence of any Members, provided enow remain to make a Court.

No Member to be absent except on some extraordinary Occasion.

And whereas, by Two Clauses in the said Act, passed in the Twenty-second Year of the Reign of his late Majesty King George the Second, it is enacted and declared, That every Person in the Fleet, who through Cowardice, Negligence, or Disaffection, shall, in Time of Action, withdraw or keep back, or not come into the Fight or Engagement, or shall not do his utmost to take or destroy every Ship which

Two Clauses in the said Act 22 Geo. II. recited,

it shall be his Duty to engage, and to assist and relieve all and every of His Majesty's Ships, or those of His Allies, which it shall be his Duty to assist and relieve, and being convicted thereof by the Sentence of a Court Martial, shall suffer Death; and also that every Person in the Fleet, who through Cowardice, Negligence, or Disaffection, shall forbear to pursue the Chase of any Enemy, Pirate, or Rebel, beaten or flying, or shall not relieve or assist a known Friend in View, to the utmost of his Power, and being convicted of any such Offence by the Sentence of a Court Martial, shall suffer Death: And whereas the restraining of the Power of the Court Martial to the inflicting of the Punishment of Death, in the several Cases recited in the said Clauses, may be attended with great Hardship and Inconvenience; be it enacted, That, from and after the passing of this Act, it shall and may be lawful, in the several Cases recited in the said Clauses, for the Court Martial to pronounce Sentence of Death, *or to inflict such other Punishment as the Nature and Degree of the Offence shall be found to deserve.*

and altered.

By an Act of Parliament passed 17th June, 1793, in the 33d Year of His present Majesty, intituled, "An Act for the Encouragement of Seamen, and for the better and more effectually manning of His Majesty's Navy," Chap. 66, Sect. 8, it is declared,

"And be it further enacted, That if the Captain of any Merchant Ship under Convoy shall wilfully disobey Signals or Instructions, or any other lawful Commands of the Commander of the Convoy, or shall desert the Convoy without Notice given and Leave obtained for that Purpose, he shall be liable to be articulated against in the High Court of Admiralty, at the Suit of the Crown, for Disobedience to the Orders of the Convoy, and upon Conviction thereof, shall be fined at the Discretion of the said Court, in any Sum not exceeding Five Hundred Pounds, and shall suffer such Imprisonment not exceeding One Year, as the said Court shall adjudge."

Vide Chap. 4, Page 85.

*By an Act of Parliament passed 6th June, 1797, in the 37th Year of the Reign of His present Majesty, intituled, "An Act for the better
 " Prevention and Punishment of Attempts to
 " seduce Persons serving in His Majesty's
 " Forces by Sea and Land, from their Duty
 " and Allegiance to His Majesty, or to intice
 " them to Mutiny or Disobedience," Chap. 70,*
 it is enacted,

SECT. 1. "That any Person who shall maliciously and advisedly endeavour to seduce, any Person or Persons serving in His Majesty's Forces by Sea or by Land, from his or their Allegiance to His Majesty, or to intice or stir up any such Person or Persons to commit any Act of Mutiny, or to make, or endeavour to make any mutinous Assemblies, or to commit any traiterous or mutinous Practice whatsoever, shall, on being legally convicted of such Offence, be adjudged guilty of Felony without Benefit of Clergy.

SECT. 2. "That Offences committed against this Act, whether committed on the High Seas, or within that Part of Great Britain called England, shall and may be prosecuted and tried before any Court of Oyer and Terminer, or legal Delivery for any County in that Part of Great Britain called England, in such Manner and Form, as if the said Offence had been therein committed.

SECT. 3. "That any Person who shall be tried and acquitted, or convicted of any Offence against this Act, shall not be liable to be indicted, prosecuted, or tried again for the same Offence or Fact, as High Treason or Misprision of High Treason; and that nothing in this Act contained shall be construed to extend to prevent any Persons guilty of an Offence against this Act, and who shall not be tried for the same as an Offence against this Act, from being tried for the same as High Treason, or Misprision of High Treason, in such Manner as if this Act had not been made."

SECT. 4. "That this Act shall continue, and be in Force until the Expiration of One Month after the Commencement of the next Session of Parliament, and no longer."

N. B. It has been continued by several subsequent Acts, and remains in Force until the Year 1807.

THE END.

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